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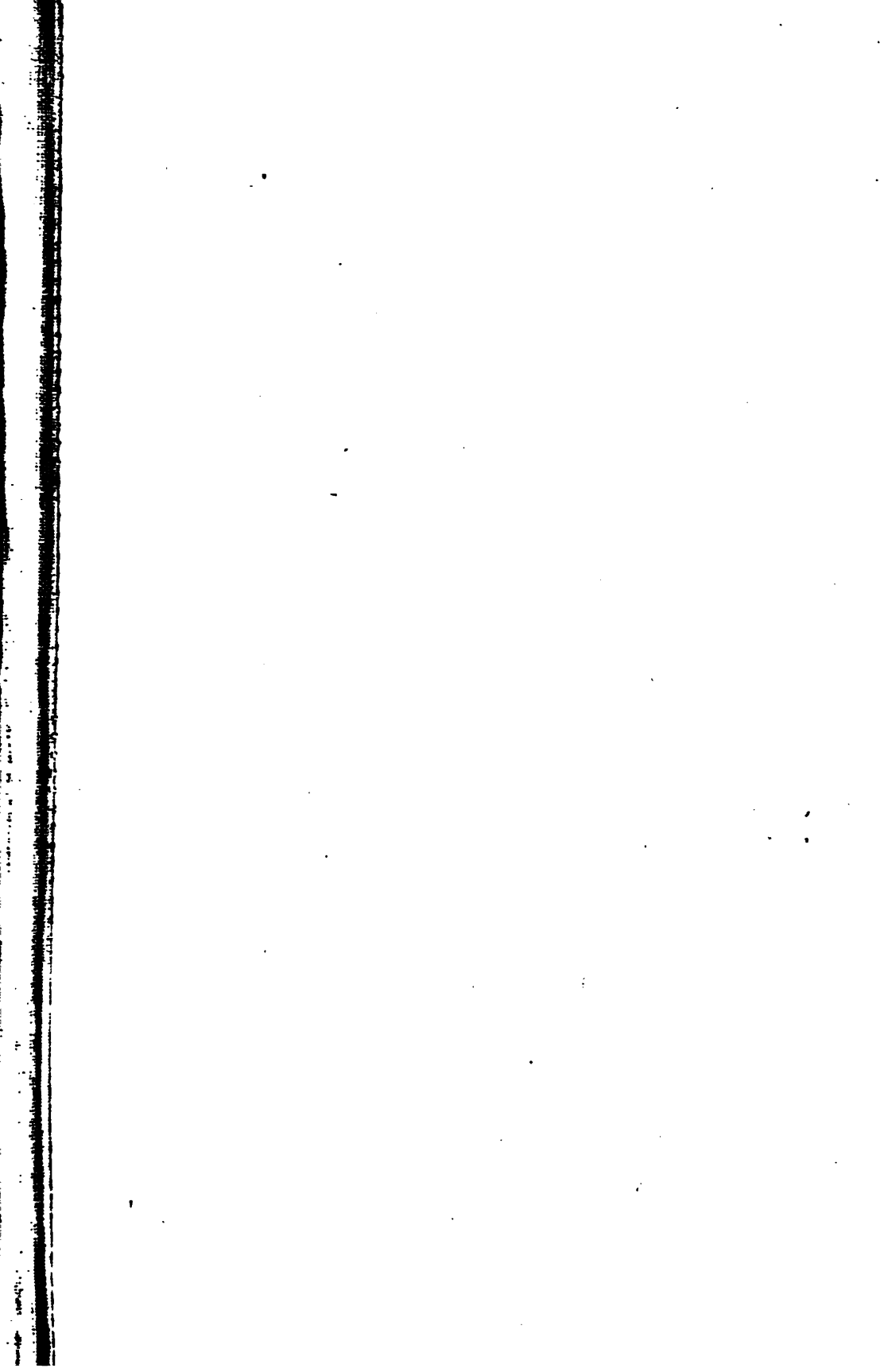
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KENTUCKY COURT OF APPEALS

G. N. PROCTER v. S. A. N. MARYMAN.

Construction of Wills—Devise—Reversion—Breach of Warranty.

A testator devised to a daughter certain personal property "to her and her heirs forever" and by a subsequent clause provided, "If any of my daughters die, leaving no child, the estate hereby devised to such ones as such die childless, remaining undisposed of by will, shall pass to my surviving children, and the children of such as may then be dead, shall take the share the parent would have taken if living." The devisee under this provision sold the personal property by general warranty, and in a suit to collect a balance due thereon for purchase money, the defense pleaded that the devisee did not have a good fee simple title to the property devised, but only a life interest, and that there was a breach of warranty. Held that the clause of the will set forth only applied to such of the heirs as should die childless, and not having disposed of the estate devised by them, by last will and that the testator only intended to apply said clause to those to whom he had devised a separate estate with power to dispose of it by bequest; that the bequest of personalty was intended as a fee simple general estate, and there was therefore no breach of warranty.

APPEAL FROM UNION CIRCUIT COURT. .

November 22, 1867.

OPINION OF THE COURT BY JUDGE WILLIAMS:

January, 1858, appellee Mrs. Maryman sold by general warranty to appellee four slaves for \$500 paid and \$1,500 to be paid with interest one year thereafter.

October 1, 1860, Proctor executed another note due one year thereafter for \$1650, which recites that it is for loaned money, but which he avers was in renewal of the first note, including the interest, and sets up as a defense to this latter note that Mrs. Maryman did not have a good fee simple title to said slaves, but only a life interest, and that there was a breach of warranty.

The circuit judge supposing the defense to be equitable, and

Opinion of the Court.

there being an amended answer offered after the jury was sworn, directed the jury to find on the petition and continued the defense and transferred the cause to the equity side of the docket, and granted an injunction against the judgment, and on final trial dissolved it and dismissed the defenses.

Mrs. Maryman (then Mrs. McAfee) derived title to said slaves by the will of her father, the only clauses which refer thereto are the 8th and part of the 14th, which are as follows:

Clause 8. "I do devise to my daughter Sally McAfee my slaves Hanna and Anna and their future increase to her and her heirs forever."

and then bequeathed \$1,000 to her brother in trust to her separate use free from the control of her husband.

Clause 14. "If any of my daughters die leaving no child the estate hereby devised to such ones as such die childless remaining undisposed of by will shall pass to my surviving children, and the children of such as may then be dead shall take the share the parent would have taken if living."

By the third clause of the will the testator devised to his daughter, Jannett Roberts, two slaves and their increase *to her separate use, with power to dispose of them by last will.*

And by the fourth clause he devised to his daughter, Susan Lee, two slaves and their increase *to her separate use, with power to dispose thereof by last will.*

By the seventh clause he devised to his daughter, Lucinda Graves, *and her heirs forever*, a slave, Nelly, and her future increase, and five hundred dollars as a separate estate, making William Maryman her trustee thereof.

It is apparent therefore that he intended the slaves devised to his daughters, Jannett and Susan, to be separate estates, with a power in each to devise them, and this whether they had children or not, whilst as to his daughters Lucinda and Sally he intended *they should have a fee simple general estate in and to the slaves devised to them, and a separate estate as to the money bequeathed.*

As there is no power vested in a married woman, by law, to devise her general estate, she can do so only by an express power in the will, which was not given by this testator.

As the fourteenth clause only applies to such of his daughters as shall die childless, and not having disposed of the estate devised

Opinion of the Court.

them by last will, it is to be presumed he only intended to apply it to those to whom he had devised a separate estate, with power to dispose of it by bequest; and this is fortified not only by the consideration that this fourteenth clause would be inconsistent with the general estate conveyed to appellee, but also from the clear manifestation of the testator appearing in the will that he intended to give her a fee simple general estate in the slaves and a separate estate in the money bequeathed to her.

If this fourteenth clause be restricted in its operation, as we think it must be, to such of his daughters as he had devised a separate estate, with power by last will to appoint it, then there was no breach of warranty, because the appellee had the entire estate in the slaves and the legal power to dispose of it; and as appellant never was disturbed in his possession by any other claim, and never can be, because of the constitutional amendment freeing all slaves, we do not see any just or legal ground upon which he should be released from any part of said debt.

We have waived any investigation as to whether appellant, under the pleadings and issues herein, could set up or prove a different consideration than the one expressed in the note, to-wit: *borrowed money*.

Also whether if said fourteenth clause of testator's will applied to appellee it would not be void as inconsistent with the estate devised to her.

Also whether it should now be presumed appellee can possibly have no children at her death, she being some forty-seven years old, of feeble health, and a widow.

Wherefore, the judgment is affirmed with damages.

Vance, for appellee,

COMMONWEALTH *v.* WM. WARD'S Administrator.

WM. WARD'S Administrator, *v.* JAS. GREEN ET AL.

Trust—Failure for Want of Trustee.

It is a well settled principle that a trust will not fail for the want of a trustee.

APPEAL FROM ANDERSON CIRCUIT COURT.

November 23, 1867.

OPINION OF THE COURT BY JUDGE HARDIN :

William Ward died in March, 1863, about 62 or 63 years of age. He was of illegitimate birth, and had never been married, and left no kindred capable of inheriting from him under our law of descents. He was the natural first cousin of Martha Green, the mother of the appellees, William Green and Sallie C. Green, and wife of James Green, with whom he at times resided; and being the owner of two small tracts of land lying in the counties of Anderson and Nelson, he appears to have put Green and his family in possession of the land about 1851, and they have since continued to live on the land, with an interruption of two or three years, including the year in which Ward died.

This suit was brought in October, 1863, by the appellant, R. M. Kerchival, as the administrator of Ward against Green and his said children and Jane Mayhall, the natural aunt of Ward, who, as the petition alleges, claims to be his heir-at-law.

The petition seeks to set aside a supposed writing, under which Green claimed to hold the land in the right of his children, and to subject the land, or part of it, to debts alleged to be owing by the estate. Said writing being alleged to be the result of a fraud on Ward and his creditors and not his act and deed.

Green filed an answer and with it exhibited the writing referred to, which purports to be the bond of Ward to Jesse Holtsclaw dated the 6th of March, 1857, obligating Ward in the penalty of \$2,500 to convey the land to Holtsclaw as trustee for said children of Green, for the recited consideration that Ward was indebted to Green in \$1,250 upon three general bonds.

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The Commonwealth was on petition made a party and concurring with the administrator of Ward that the bond was not valid. asserted claim to the land as having escheated to the State.

And the appellees, the children of Green, by a guardian *ad litem*, filed their answer claiming the land under said bond.

The court adjudged that said appellees were entitled to the land under the bond, and that their possession be quieted and the title conveyed to their use in pursuance of the bond, and from this judgment these appeals are prosecuted.

Although the opinions of the witnesses are conflicting as to the capacity of Ward to dispose of his property, and he was undoubtedly a weak man of eccentric manners and habits, it appears, we think, by a decided preponderance of the evidence that he was competent at the date of the bond to make a valid contract or disposition of his property. The witnesses who testify to his capacity are sustained by the undeniable facts that he had learned a difficult mechanical trade and by his own frugality accumulated the property in controversy.

We are not satisfied that Ward really owed Green the \$1,250 expressed in the bond, or that Green paid in money any adequate price for the land. But though it is most probable that for some reason which both Ward and Green understood and approved, the consideration expressed in the bond was fictitious, it is clearly shown that Ward was much attached to Green's wife and children and recognized a relationship and obligation to them, and on that account repeatedly expressed the intention to give the land to Green's children. The execution and delivery of the bond are sufficiently proved, and on well settled principles the failure of Holtsclaw to accept the trusteeship could not defeat the trust.

It does not appear that the bond was made in fraud of the rights of creditors at the time, nor is it shown by the administrator that it is necessary to sell any real estate for the purpose of paying debts.

We perceive no error in the judgment prejudicial to either of the appellants, and it is therefore affirmed on both appeals.

R. E. LARKIN *v.* JOHN MILLIT.**Debtor and Creditor—Debts Purchased by Agent—Participation in Fraud—Equity Will Not Relieve.**

Equity will not relieve a debtor from the payment of debts purchased by his agent, where he has participated in the fraud committed on his creditors by his agent.

APPEAL FROM JEFFERSON CIRCUIT COURT

November 23, 1867.

OPINION OF THE COURT BY JUDGE HARDIN :

Although there is some contrariety of evidence as to the understanding between Larkin and Millit, under which Larkin purchased the debts of Millit, it is proved, we think, by a decided preponderance of the evidence, that Larkin acted and premitted the use of his name in buying up the debts as the friend and agent of Millit, and mainly by the use of his means.

Although it is shown that Larkin drew upon and used the greater part of a fund of \$2,279.79 of his own money in the hands of Graham at Philadelphia, in payment for claims purchased by him on Millit, it appears from the evidence of Crabb, sustained by other evidence, that he was reimbursed the amount so paid; but if on this or any other account Millit is, on a settlement, indebted to Larkin, the claim of the latter may yet be legitimate, and for that purpose he seems to be prosecuting a cross petition in the suits in the Fulton Circuit Court. What we mean here to decide is, that Larkin is not in his own right the owner of the judgments and other claims enjoined by Millit, and is not therefore entitled to enforce them as such.

The objection of the appellant that Millit ought not to be relieved in a court of equity, because according to his own theory he was guilty of participation in a fraud upon his creditors, is not, as we think well taken. While the principle thus attempted to be applied is undoubtedly correct, and there is evidence conducing to show that the real character of Larkin's agency in buying the claims was not truly disclosed to a part of the creditors, it does not still appear that it was not true as professed and repre-

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sented by both Millit and Larkin that the propositions made to and accepted by the creditors were not reasonable and just, in view of Millit's large indebtedness compared with his means of paying.

The judgment is affirmed.

COMMONWEALTH FOR E. C. SUBLETT, *v.* W. H. HUDSON.**Execution—Failure to Return—Insolvency of Debtor No Excuse—Penalty.**

The fact that an execution debtor is insolvent, will absolve an officer from liability for the debt, but it cannot relieve him from the penalty for failure to return the execution.

APPEAL FROM ADAIR CIRCUIT COURT.

October 3, 1867.

OPINION OF THE COURT BY JUDGE ROBERTSON:

It sufficiently appears that the last execution was delivered to the appellee for official action, and that, though the enforcement of it was suspended by statute until the 1st of March succeeding the return day, yet there never was any return of it. And while the established insolvency of the Execution debtor absolved the officer from liability for the debt, it cannot relieve him from the penalty prescribed for failure to return the execution.

Wherefore the judgment exonerating the appellee altogether is reversed, and the cause remanded for a new trial.

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E. SMITH v. WM. RODES ET AL.

Appeal—Final Order—Filing Away—Motion to Reinstate.

An order directing that a case be filed away is not final and an order of the court overruling a motion to reinstate the case on the docket is not a judgment dismissing the action from which an appeal may be prosecuted.

APPEAL FROM ROCKCASTLE CIRCUIT COURT.

October 3, 1867.

OPINION OF THE COURT BY JUDGE HARDIN :

The order directing that the case be "filed away until the further order of the court" was not, in our opinion, a final order, as equivalent to a dismissal of the action. It is however insisted for the appellant that the subsequent order of the Court overruling the plaintiff's motion to reinstate the cause on the docket was constructively a judgment dismissing the action from which an appeal may be prosecuted by this court. But we do not so construe the action of the court, which, in our opinion, did not constitute a final judgment, revisable in this Court, but amounted only to a non-suit, reserving to the plaintiff the right to prosecute his claim by another action.

As from this view it results that this court has no jurisdiction of the subject of this appeal, the appeal is dismissed.

Turner, for appellant.

Beeman, for appellee.

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J. SAMUEL ET AL. v HUGH M. CROWELL.

Land—Partition—Agreed Time—Long Acquiescence—Mistake.

Where the owners of land agree upon a partition line and each occupy their respective parcels up to that line for a long time by themselves and vendees, a court of equity will not disturb it, although there might have been a mistake in the written evidence of the partition.

APPEAL FROM CRITTENDEN CIRCUIT COURT.

October 3, 1867.

OPINION OF THE COURT BY JUDGE PETERS:

The bond under which appellants claim is dated in 1843. Subsequent to its date appellee, and Tudor, as is proved by several witnesses, divided the tract by a line which was acceptable to both, and each occupied their respective parcels up to that line, and in 1849 Tudor sold and conveyed his part of the tract to Hubbard, as appears from a copy of the conveyance filed as an exhibit in the case.

From the foregoing facts and circumstances, together with the long acquiescence of the parties, for this action was not brought until March, 1860, we cannot doubt that there was a mistake in reducing the contract of the parties to writing, and that they afterwards corrected that mistake themselves by agreeing upon a line of partition.

The judgment requires Crowell to convey the land to Tudor's vendee. Whereby he will get title to all the land to which Tudor was entitled under his contract.

The rights of the parties are properly adjudicated, and adjusted according to their contract as we understand it. And the judgment is therefore *affirmed*.

Harlan, for appellant.

D. H. Hughes, for appellee.

J. W. GOFF v. H. W. HOWARD.**Instruction—Written Contract.**

In a suit to enforce a written contract, where one of the articles purchased was by mistake and oversight omitted from the contract, an instruction that "the law presumes the written contract read to them expresses the full terms of the agreement made between the parties, and the jury will so find, unless they are satisfied from the evidence that the contract about the shelling machine was left out of said writing by the mistake of the parties when signed by them," is held to be the true expounding of the law.

Contracts—Condition Precedent.

Where one party to a contract fails to perform a condition precedent, within a reasonable time, the other party has a right to regard the contract at an end.

Same—Contracts—Writing Evidencing—Presumption—Mistake and Oversight—Burden of Proof.

The presumption of both law and facts are that the written memorial contains all the covenants of the parties and he that asserts it does not, (but that some were left out by mistake or oversight), must bear the burden of proof.

APPEAL FROM HENDERSON CIRCUIT COURT.

October 6, 1867.

OPINION OF THE COURT BY JUDGE WILLIAMS:

If, as averred by appellee, appellant was to furnish the sheller to shell the corn sold to him, but was left out of the writing evidencing the contract through mistake and oversight, the furnishing it, like furnishing the sacks and twine, was a condition precedent to be performed before appellant could recover, and if not done within a reasonable time appellee had a right to regard the contract at an end.

The evidence certainly authorized the jury to find that the corn sheller was to be furnished by appellant, and that this was left out by mistake when the contract was reduced to writing, and there should be no reversal unless the court misdirected the jury.

Appellant's instruction No. 7 informed the jury, that

"The law presumes the written contract read to them

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expresses the full terms of the agreement made between the parties and the jury will so find, unless they are satisfied from the evidence that the contract about the shelling machine was left out of said writing by the mistake of the parties when signed by them."

We regard this as a true expounding of the law applicable to the facts of this case.

The presumption of both law and facts are that the written memorial contains all the covenants of the parties and he that asserts it does not, (but that some were left out by mistake), bear the burden of proof, and must overcome these presumptions by evidence reasonably convincing, but he is not required to establish this beyond a reasonable doubt.

If the jury are satisfied by reasonably certain evidence, that by mistake some portion of the agreement was left out of the written memorial, they may so find, although a doubt might rationally be entertained as to this.

The instructions refused did not conform to this view of the law and were therefore properly rejected.

The judgment is affirmed.

Turner, for appellant.

Cissel & Vance, for appellee.

JNO. M. JAMES ET AL v. W. D. BLACK.

Principal and Surety—Other Names—Principal Sureties' Agent—Bond—Delivery—Fraudulent Combination.

If the sureties in a bond shall see proper to trust their principal as their agent to get other names and to deliver the bond to the obligee they will be bound by his acts, unless they can show a fraudulent combination with the obligee; the bare knowledge of the latter is not sufficient.

APPEAL FROM PULASKI CIRCUIT COURT.

November 26, 1867.

OPINION OF THE COURT BY JUDGE WILLIAMS:

The court committed no error in the excluding of the testimony, if the sureties in a bond shall see proper to trust their prin-

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cipal as their agent to get other names and to deliver the bond to the obligee, they will be bound by his acts in delivering the bond without getting such names unless they can show that he entered into a fraudulent combination with the obligee. The bare knowledge of the latter, if certainly made out of the understanding between the agent and his sureties, will not defeat the obligatory force of the bond. If sureties should desire to protect themselves in such cases, they can do so by either seeing that all the proposed sureties sign their names, or by a covenant in the writing that it is not to be obligatory until signed by the therein named sureties.

The evidence tends strongly to establish a fraudulent sale by Grover to Murphy, and the subsequent sale of a part of the land conveyed to Murphy, by Grover to James and Williams, and Murphy's ratification of it fortifies this conclusion, and indicates that though James' and Williams' notes were taken by Grover payable to Murphy, yet that these really belonged to Grover, and there was nothing erroneous in their appropriation to the benefit of Grover's creditors.

The petition has a two-fold object, one to set aside the fraudulent conveyance by Grover to Murphy, the other to obtain an attachment for \$800. As the suit would be a *lis pendens* as to the land, there was nothing erroneous in holding the notes of James and Williams to Murphy, but which really belonged to Grover, responsible to the extent of \$800 under this attachment. All parties had a knowledge of the objects of the suit from service of process on them, and any voluntary payment of these notes after process served would be in the party's own wrong. Seeing no available error in the record, the judgment is affirmed.

Van Winkle, for appellant.

James, for appellee.

COURT NICHOLAS v. A. J. OLDHAM.

Nonresident—Judgment—Appeal—Affirmance.

A judgment against a non-resident, constructively summoned, can not be affirmed unless by appeal.

APPEAL FROM JEFFERSON CIRCUIT COURT.

October 1, 1867.

OPINION OF THE COURT BY JUDGE WILLIAMS:

Whatever may be the errors in the proceedings against Joseph Knapp, we cannot consider them, because he was only constructively summoned, if indeed so brought before the court, and he can proceed under the Code to re-open and re-try the cause, else prosecute an appeal, but until he proceeds one way or the other, we cannot determine the alleged errors as to him.

We perceive no error in the proceedings or judgment as to appellant, therefore an affirmance must be avoided.

N. & W. J. SMITH v. J. M. CRABB.**Agency—Establishment of—Burden of Proof.**

The burden of proving an agency is on the one claiming to act as such.
Instructions as to Competency of Evidence.

It is error to refer the competency of evidence to the jury. All evidence permitted, by the court, to go to the jury should be regarded by them as competent.

APPEAL FROM JEFFERSON CIRCUIT COURT.

October 1, 1867.

OPINION OF THE COURT BY JUDGE WILLIAMS:

The court, in appellee's first instruction, having told the jury that it was essential for defendant to prove authority from the plaintiff to purchase for him gold on margin in the name of N. Smith, added also, "*and if in the opinion of the jury the defendants have failed to prove this by competent testimony, then they*

should find for plaintiff." There are two objections to this instruction. Whilst it was certainly correct to say that the burden of proving an authority from appellee to purchase gold on margin for him was on defendants, it was not essential to prove in what name it was to be purchased, and although defendants should show that the gold was purchased in good faith for plaintiff, yet according to this instruction, they might then be defeated, because they could not show it was agreed this should be done in N. Smith's name, when likely no name was suggested or agreed on, nor does the proof show any such was.

It was also erroneous in referring the competency of the evidence to the jury, as all evidence permitted by the court to go to the jury should be regarded by them as competent, and with which they have nothing to do, but they must determine the conclusion to be drawn from this evidence, under this instruction, instead of deciding what the evidence established. They may have disregarded it as incompetent to establish the authority in the defendants to purchase gold on margin.

The fourth instruction given for appellees is also objectionable in its peremptory direction to the jury that there was no evidence of a legal binding ratification of a purchase of gold upon margin by defendants for plaintiff, instead of instructing what would amount to a binding ratification, and leaving it to the jury to determine whether it was established, for certainly there is evidence tending to prove such ratification, and this should not have been withdrawn from the consideration of the jury by a peremptory instruction.

If appellee did authorize the defendants at their discretion to invest the remainder due from them to him in gold on margin without special instruction on agreement as to the name in which the investment was to be made, and they did in good faith so invest it in the name of N. Smith, appellees are bound by the contract, and should suffer the loss.

The investment in the name of N. Smith may raise an unfavorable inference as to its being done for appellee, yet this inference may be repelled by showing that defendants did so invest at the time for some friend, and they regarded it all the time as for appellee, and especially if they were not in the habit of so investing on their own account, as may be inferred from their occupation

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being commercial and not financial, and from a total absence of any proof of such habit.

As to whether it was agreed to invest in any particular name, or whether any special instructions were given, or whether the investment was to be for cash gold or on margin, or whether appellants in good faith did so invest for appellee in the name of N. Smith, are all proper issues of fact, which the jury should be permitted to decide upon the evidence, as well as whether appellee, with a knowledge of the facts, afterwards recognized and ratified said investment.

The judgment is reversed, with directions for a new trial and further proceedings as herein indicated.

Barrett & Roberts, for appellant.

Mix, for appellee.

THAYER D. WHITE v. HANNAH E. SEATON; CAMBRIDGE CULBERTSON ET AL. v. H. E. SEATON.

Land—Sale of—Failure of Title—Fraud and Mistake—Rescission—Burden of Proof.

It is a well established principal that a purchaser who has accepted a conveyance cannot afterwards have a rescission of the contract unless it be for fraud or mistake shown to have operated on him when he accepted the deed and the burden of proof is on the party alleging fraud and mistake.

Subsequent Purchasees—Cross Petition—Rescission.

A contract will be rescinded on cross-petition of a vendee, who has subsequently purchased a part of the land from the party who is seeking to rescind the contract of his purchase, on the ground of fraudulent statements made to him, where he has represented to his vendee that the statement he complains of were true.

APPEAL FROM GREENUP CIRCUIT COURT.

November 26, 1867.

OPINION OF THE COURT BY JUDGE HARDIN:

About the year 1787 there was patented to Thomas Keith, of the State of Virginia, a tract about 26,000 acres of land, now

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embraced by the counties of Lewis and Greenup, in this State, about 12,000 acres of the land lying in Greenup County. Keith sold and conveyed the whole of the land to Joshua Harland, of the State of Pennsylvania, by a deed made in October, 1794, but not recorded until October, 1801.

After the death of Keith, Samuel Seaton, who resided in Greenup County, set up a claim to the land under a deed from Keith's heirs made in 1845, and proceeded to erect on that part of the land lying in Greenup County, and which was supposed to include about 12,000 acres, the iron manufacturing establishment called "Newhampshire Furnace," and on the 14th day of September, 1848, he executed a mortgage of the land in Greenup County, including the Newhampshire furnace, to John Culver to secure Culver in a debt of \$7,656.44 he owed Culver, and also to indemnify him in large amounts for which Culver was bound as his surety.

Seaton died, leaving a will by which he devised the land and iron works to his widow, Hannah E. Seaton, who, by a deed of quit claim dated the 1st day of April, 1853, sold and conveyed to Thayer D. White the one undivided half of her interest in the Newhampshire furnace and land in Greenup County, with certain reservations, for the price of \$17,500, for which White executed several notes payable at one, two and three years. On the 10th day of September, 1853, White sold and conveyed by a quit claim deed to Thomas Davisson an undivided interest of one-sixteenth part of Keith's survey in Greenup County, and in said furnace and property connected with it, for the price of \$2,175, for which White took Davisson's notes.

And on the 1st day of June, 1854, White sold and conveyed by a like deed to Cambridge Culbertson one undivided fourth part of said property, or half the interest conveyed to White by Hannah E. Seaton, for the price of \$10,000, for which Culbertson executed several notes to White.

Mrs. Seaton sold and conveyed her other moiety in the property to other parties, but subsequently cancelled the sale, and took a reconveyance of it.

After having transferred part of White's notes to Culbertson, and others to whom she was liable upon recourse as assignor of the notes, said Hannah E. Seaton brought this suit in equity, against White and his vendees, Harrison and Culbertson, and

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others alleged to be indebted to him, to attach and subject the choses in action of White to the payment of the notes for purchase money on White held by her and her assignees.

In the meantime, a suit was prosecuted against Mrs. Seaton and others in possession, by the heirs of Joshua Harland, to recover the whole of the land under the deed from Thomas Keith to Harland, and that suit having been decided for the defendants in the court below, the judgment was reversed by this court, and the title and right of Harland's heirs to recover was finally established (18 B. Monroe, 325).

White in his defense resisted the recovery sought by Mrs. Seaton, and by a cross petition alleged that he was induced to enter into the contract through mistake on his part, and by misrepresentation and fraud practiced upon him by John Seaton, the son and agent of the plaintiff, who negotiated the trade. That said agent falsely assured him that the pretended deed from Keith to Harland was a forgery, and that the heirs of the latter could not recover in their suit, and moreover grossly deceived him as to the quantity and quality of certain leads of iron ore on the land, and induced him to believe large and valuable quantities of ore were included within the boundaries of the land, which were not in fact situated upon it, and that by all these false representations and assurances of said agent, he was induced to purchase the interest sold him at the price of \$17,500, which was the full value of it, if all of said representations had been true, and was so also induced to accept the deed without warranty. The cross petition seeks a rescission of the contract.

The averments of the cross petition importing fraud and mistake, are replied to and controverted by Mrs. Seaton; she does not profess however to deny the material averments from personal knowledge of what transpired between her agent and White.

Davissou and Culbertson, by their answers to the original petition, as well as by cross pleading between them and White, seek to rescind their contracts of purchase with White.

The court below, besides deciding several questions not now before us on this appeal, adjudged a confirmation and enforcement of the sale to White, and also of the sales from White to Davissou and Culbertson, and from this judgment both White and Davissou and Culbertson have appealed to this court.

It is a well established principle that a purchaser who has

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accepted a conveyance cannot afterwards have a rescission of the contract, unless it be for fraud or mistake shown to have operated on him when he accepted the deed. The facts alleged by White in his cross petition conducing to show that he was deceived by John Seaton, who acted as the agent of his mother, and that Seaton induced him to enter into the contract and accept the deed by false and fraudulent assurances as to the quality and mineral wealth of the land, as well as the title and claim of Harland's heirs, or by representing the deed of Harland to be a forgery, are, we think, substantially and sufficiently controverted by Mrs. Seaton; and the burden of proving the facts relied on rests upon White. They are not proved in any manner except by White's own deposition, which of course cannot be regarded as evidence for himself. We cannot infer from the recitals in the deed, nor from the fact, that the price agreed to be paid seems to be exorbitant for so doubtful a claim already imperilled by litigation, that White did not enter into this hazardous, and as it has resulted, most unfortunate purchase, from reasons and considerations wholly different from any of those alleged in his cross petition as having been falsely suggested to him by Seaton. If, in the absence of direct evidence, we are to indulge in inferences, it seems to us not improbable that White purchased and accepted the deed for the land as a chancing bargain, having confidence no doubt that the claim would be sustained in the then pending litigation with Harland's heirs. He discloses the fact himself that he had knowledge of the claim and suit of Harland's heirs, and it is not unreasonable to suppose that he relied on other evidence than that of John Seaton as to the probable danger of losing the land, and accepted the deed without warranty because he was willing, at the stipulated price, to risk the title.

The case presented by the answer and cross petition of Culbertson and Davisson, for a rescission of their contracts with White, is we think much better sustained. All the charges made by White, importing fraud and misrepresentation on the part of Seaton to induce him to purchase, are relied on by Culbertson and Davisson as grounds for avoiding the deeds to them, they alleging that they were induced to buy of White and accept his deeds not only by his own representations, but on the faith also of the alleged statements and assurances of Seaton to White, which were communicated to them as true by White.

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On the issues formed on the cross petitions of Culbertson and Davisson against White and others, White seems to have been a competent witness for them, although his deposition was not competent evidence for himself or those united with him in the issue involving the validity of the conveyance from Mrs. Seaton to him.

The testimony of White conducing to show that Davisson and Culbertson were deceived as to the validity of the claim of Harland's heirs, and as to other material facts, by the assurances of Seaton to White, communicated to them by White, together with other strong equitable considerations appearing in the record, was, we think, in the absence of contradictory testimony, sufficient to entitle said Davisson and Culbertson to a rescission of the contracts between White and them, on their cross petitions.

Wherefore on the appeal of White the judgment is affirmed; but on the appeal of Culbertson and Davisson it is reversed, and the cause remanded, with directions to overrule the exceptions to the deposition of White, so far as Culbertson and Davisson are concerned, and for further proceedings not inconsistent with this opinion.

FANNY RAY ET AL V. RAY, ADMR. ET AL.**Commissioner's Report—Judgment of Court—Appeal and Error.**

Where a commissioner finds against a defendant, contrary to the rules given by the trial judge in referring matters to the commissioner for an equalization among heirs, such part of the commissioner's report as is violative of the judgment of the presiding judge, will be set aside by the appellate court, on the face of the pleadings.

APPEAL FROM GARRARD CIRCUIT COURT.

January 13, 1868.

OPINION OF THE COURT BY JUDGE WILLIAMS:

In the judgment rendered August 31, 1865, the Circuit Court, among other directions to the commissioner as to the manner of dividing the land among the heirs so as to equalize them, says that it is "*of opinion that Zach. Ray shall not be charged with rents for 1864 and 1865,*" yet as the commissioner to whom had been

referred the question of advancements had found and reported as to Zach. for negroes, horse, furniture, etc., \$1,030; rent for 1864, \$200, and for 1865, \$125, making \$1,355, the subsequent commissioners appointed to equalize the heirs and divide the land, took the report of the former commissioner without observing the direction of the court, hence the error; as there is no appeal from the judgment of the court disallowing the rents for 1864 and 1865, we now think that these rents should be disallowed in toto, and that the land should be assigned appellants on the basis of an advancement of \$1,030 to Zach. Ray, instead of \$1,355; and the opinion of the court is so modified as to direct another allotment of the land to appellants on the basis of an advancement to Zach. Ray by his father of \$1,030, and that what may be coming to him over this sum in land be assigned to appellants, observing the directions of the Circuit Court that the personal estate is not to be included in this division, save that small sums may be used to equalize the different allotments of the land.

Bradley, for appellant.

Dunlap & Anderson, for appellee.

W. H. PILANT *v.* WILLARD DAVIS ET AL.

Attorney and Client—Relation—Dealings—Constructive Fraud—Burden of Proof—Petition Need Not Allege Fraud.

1. The law not only watches over the transactions between attorney and client, but it often interposes to declare such transactions void. On the other hand, dealings between them are not necessarily void, but the burden of establishing perfect fairness, adequacy and equity is thrown upon the attorney and it is not necessary for the client to allege in his petition that the transaction was fraudulent.

Innocent Purchaser.

2. Upon investigation Tuter would have found that the land had been sold by a commissioner of the court, and although W. H. Pilant had purchased at the sale, and received a certificate of his purchasing, still he would have also learned that said certificate and the benefit of the purchase had been transferred to his vendor, by one legally authorized to

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make the transfer, as adjudged by the court, that the legal title had been regularly conveyed and deed recorded by judicial sanction. Having ascertained the facts he was not required to go farther.

APPEAL FROM GARRARD CIRCUIT COURT.

November 25, 1867.

OPINION OF THE COURT BY JUDGE PETERS:

At a judicial sale, made on the 10th of November, 1863, under a judgment of the Garrard Circuit Court, appellant purchased two adjoining tracts of land in said county, sold as the property of the heirs of Groomes Taylor, the one containing 199 A., 2 R., 26 poles, at the price of \$30 and 12-100 per acre; the other containing 24 A. and 13 poles, at \$65 per acre; and the master who made the sale gave him a certificate of his purchase. On that certificate there is an indorsement in the following words: "For value received, I have this day assigned and transferred to Willard Davis the benefit of the within purchase, Aug. 22d, 1864. (Signed) William Pilant. By James Pilant, agent and attorney in fact."

On the day said indorsement bears date the following orders, made in the Garrard Circuit Court, in the case of R. Kanatzer and others against Lucinda B. Taylor and others, the same case in which the judgment for the sale of said lands was made.

It appearing that W. H. Pilant, by his agent and attorney in fact, has transferred the benefit to his purchase of land reported by commissioner to Willard Davis, as evidenced by certificate filed, and indorsement thereon, and acknowledgment made in open court by James Pilant, the agent and attorney in fact of Wm. H. Pilant, of said sale and transfer, and it being admitted that said Davis has paid to commissioners the purchase money of the land, after crediting the mortgage, which is paid by Davis to W. H. Pilant's agent and attorney in fact, the commissioner, G. W. Dunlap, is directed to make conveyance of the land aforesaid to said Davis, who thereupon acknowledged said deed in open court, which was examined, approved, and indorsed by the court, and ordered to be certified to the clerk of the Garrard County Court for record. Said commissioner is allowed \$1.50 for making said deed, to be taxed in the costs, and the residue of the cause is continued. The deed of the commissioner to Davis corresponds in

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date with said order, and recites that by a judgment of the Garrard Circuit Court, rendered at its August term, 1863, in the case of R. Kanatzer, etc., against Lucinda B. Taylor, etc., the undersigned was appointed a commissioner, among other things, to sell the landed estate of Groomes Taylor, deceased; that on the 10th of November, 1863, he offered said tracts of land for sale, and W. H. Pilant being the highest and best bidder, became the purchaser of 199 acres, 2 roods, 26 poles, at \$30.42 per acre, and 24 acres and 13 poles, at \$65 per acre, and executed his two several notes, payable in twelve months, and received the certificate of said commissioner of his said purchases; that said W. H. Pilant, by his agent and attorney in fact, James Pilant, on the 22d day of August, 1864, assigned the benefit of his purchase to Willard Davis, and in open court, by his agent aforesaid acknowledged said sale and transfer, and filed the same as part of "*this proceeding*," and that said Davis has paid the purchase notes of said Wm. H. Pilant (after crediting the same with the lien by mortgage of the said Wm. H. Pilant on the land so sold), and satisfied and paid to James Pilant, agent and attorney in fact of said Wm. H. Pilant, his lien aforesaid, and referring to the order of court heretofore quoted, in consideration of the premises, conveyed both tracts of land to said Willard Davis.

On the 24th of February, 1865, Davis conveyed to N. H. Tuter the larger tract conveyed to him by the commissioner as aforesaid, in consideration of \$7,960, payable in installments. Under the commissioner's deed to him, Davis took possession of both tracts, and delivered possession to Tuter of the tract conveyed to him.

This equitable action was brought by Wm. H. Pilant against Davis, Tuter, and James Pilant, to set aside the conveyance of the commissioner to Davis, and of Davis to Tuter, and to have both tracts conveyed, and the possession surrendered to him, upon the alleged grounds that Davis, who *had assumed* to act as the attorney of "the plaintiff in the matter, *improperly* procured the defendant, James Pilant," to transfer and assign to said Davis his said certificate as his agent and attorney, when he was not his agent, or attorney, and never was, and had not even a colorable authority to assign or transfer said certificate, or to sell said land. That said defendants, Davis and James Pilant, appeared in court, and by "*wrongfully and untruthfully*" representing to the court that the said plaintiff was dead, leaving issue, and that said James

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was his father and heir, and presenting said certificate of purchase, with the indorsement, procured said order and deed to be made, and that said James Pilant, to whom Davis pretended to have paid the mortgage debt, was then, and had been for years before, insolvent. He furthermore alleges that the facts stated in the petition were known to Tuter at the time he contracted for the purchase of said land, and before he paid on the note first to mature \$1,521, which he avers to be all that he paid.

The sale of the lands by the commissioner, the purchase by appellant, the execution of the certificate of purchase by the commissioner, are all admitted by Davis, and it is virtually admitted that James Pilant, who made the assignment of said certificate, had no authority or power to act for appellant, as his agent, or attorney in fact. But the grounds relied on by Davis to defeat the action are mainly that he believed James Pilant had the authority from his son to make the transfer; that there was some rumor in the county that appellant was dead; that he acted in the matter in good faith, and that appellant fails to charge in direct terms that the transaction was fraudulent by which he procured the deed to be made to him, and finally, and principally, upon the order of court directing the deed to be made to Davis before referred, and the deed of the commissioner properly authenticated, stamped, etc. The Circuit Judge set aside the transfer to Davis, and ordered him to surrender possession of the 24 acres and 13 poles of land to W. H. Pilant, upon being paid the amount which he paid for the land over and above the amount of W. H. Pilant's mortgage debt, with interest, and that he should be charged with rents and allowed nothing for improvements; adjudged Tuter an innocent purchaser, and confirmed the sale to him; but adjudged that Pilant was entitled to the price Tuter agreed to pay Davis for the land, and that he should pay the amount unpaid to him, and that the note given to Jas. Pilant by Davis be surrendered; and Davis and W. H. Pilant both appealed.

If it be admitted that James Pilant had authority from appellant to transfer the certificate of sale, or suppose appellant had done it himself, and it had been alleged, or it otherwise properly appeared in the record that Davis was his attorney in the case, and the connection still exists at the time of the alleged transfer, what would have been the result, even in that case, of a suit to set aside the sale and transfer? Justice Story says, sec. 310, vol. 1,

Story's Equity Juris: In the next place, as to the relation of client and attorney, or solicitor, it is obvious that this relation must give rise to great confidence between the parties, and to very strong influences over the actions, and rights, and interests of the client. The situation of an attorney, or solicitor, puts it in his power to avail himself, not only of the necessities of his client, but of his good nature, liberality, and credulity, to obtain undue advantages, bargains and gratuities. Hence the law, with a wise providence, not only watches over all the transactions of parties in this predicament, but it often interposes to declare transactions void, which between other persons would be held unobjectionable. It does not so much consider the bearing or hardship of its doctrine upon particular cases, as it does the importance of preventing a general public mischief, which may be brought about by means, secret and inaccessible to judicial scrutiny, from the dangerous influences arising from the confidential relation of the parties. By establishing the principle that, while the relation of client and attorney subsists in its full vigor, the latter shall derive no benefit to himself from the contracts, or bounty, or other negotiations, of the former, it supersedes the necessity of any inquiry into the particular means, extent and exertion of influence in a given case, a task often difficult and ill supported by evidence, which can be drawn from any satisfactory sources.

Sec. 311. On the other hand, it is not necessary to establish that there has been fraud or imposition upon the client; and on the other hand, it is not necessarily void throughout, *ipso facto*. But the burden of establishing its perfect fairness, adequacy, and equity is thrown upon the attorney, upon the general rule that he who bargains in a matter of advantage with a person placing a confidence in him, is bound to show that a reasonable use has been made of that confidence, a rule applying equally to all persons standing in confidential relations with each other. If no such proof is established, courts of equity treat the case as one of constructive fraud, etc. And in the concluding sentence of sec. 312, 2 B, it is said: "Sales made and annuities granted to attorneys, under similar circumstances, will, upon the same principles of public policy, be set aside at least, unless they are established to have been transacted *uberrima fide*."

It is true that appellee Davis denies that he "*assumed*" to act as the attorney of appellant; but we understand from that that

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he repels the charge of *assuming* that character, and to assert he was the regularly employed attorney of appellant. He would not have denied that he was the attorney of appellant in the case if it had been directly and positively alleged in the petition, but if he had, it would have been shown by the following facts the day before he executed the deed to appellee, Tuter, for the land conveyed to him, he (Davis) executed a receipt to G. W. Dunlap, the commissioner in the said suit of Kanatzer, etc., v. Lucinda Taylor, etc., for \$185.93, amount due appellant, and for over two hundred dollars, the amount reported to be due and adjudged to James Pilant, the same receipt embracing both sums, which he signed as the attorney for both of them. On the 16th of February, 1884, he presented the claims of appellant against the estate of Groomes Taylor, proved them to be just, and swore in the affidavit that Pilant was absent from the State, and that he was his attorney. He was present at the sale of the land on the 11th of November, 1863, representing himself there as the attorney of appellant, bid for the land in his name, and purchased the same for him, as Borton and others who were at the sale prove, and on the last named day signed the bonds for the purchase money as the attorney of Wm. H. Pilant, and signed them as the surety. The affidavit, receipt, and notes are filed as evidence in the case, and stand uncontroverted, covering a period of two years, commencing before and terminating six months after the alleged transfer of the commissioner's certificate of sale to him by James Pilant, and during all that time he never failed to declare his employment by appellant when necessary, and to manifest it by acts, until the certificate of the commissioner of the sale of the land was produced in court, with the transfer indorsed, and signed by James Pilant, and his motion to have the sale confirmed, and the conveyance made to himself.

But again the facts stated in appellee's affidavit, all of which were admitted, are confirmatory, if confirmation were needed, of the existence of the connection of attorney and client between these parties at the time and after the transfer of the certificate of sale to him, in that he states that one Lawless will prove that he heard appellant say that he had authorized his father, said James Pilant, to employ him, said Davis, as his attorney at law to foreclose the mortgage on the land in contest, and collect the mortgage debt. This authority to his father, according to appel-

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lee's own statement, was limited to one single act, to employ Davis as his attorney at law for a designated purpose; when that was done his authority ceased; he was not empowered even to receive the money from Davis.

The residue of the affidavit relates to the then reputed death of appellant, and it is not improbable that that rumor was the source of these troubles; but be that as it may, the evidence puts it beyond all controversy that the relation of attorney and client subsisted between the parties, when the transfer aforesaid was made, and as appellee Davis has failed to show that the transaction was perfectly fair and equitable, and the price paid or promised adequate, it cannot stand.

It was not necessary that it should be alleged in the petition that the transaction was fraudulent; when the facts, as in this case, are established, courts of equity treat them as amounting to constructive fraud.

Nor can the transfer to Davis be sustained on the ground that James Pilant represented himself as the agent or attorney of his son; he knew that the son lived in Louisiana, had not been in Kentucky during the time the suit was progressing, and if his father had any agency further than to engage his services, it would have been most probably evidenced by a letter; no such letter is shown, and the existence of any such agency is repelled by the fact that Davis swore to the claim of young Pilant, bought the land, and executed notes for it in the presence of the father, for it is proved that he was present at the sale. And it further appears that Davis was not only the attorney at law for the son, but was also attorney for the father.

It remains now to examine what is Tuter's position in the controversy. If it be conceded that, having obtained the legal title, although all the purchase money was not paid, that he was, according to the legal and technical meaning of the term, a purchaser, still is he an innocent purchaser without notice of appellant's equity. By reference to the deed from the commissioner to Davis, his vendor, he would have learned that the land had been sold by a commissioner, under a judgment of the Garrard Circuit Court, and that, although Wm. H. Pilant had purchased at that sale, and received from the commissioner a certificate of his purchase, still he would have also learned that said certificate and the benefit of the purchase had been transferred to his vendor by

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one legally authorized to make the transfer, *as adjudged by the court*; that a judgment appointing a commissioner to convey the legal title of the land to him had been rendered, a conveyance made in conformity thereto, and the deed recorded by judicial sanction.

Having ascertained these facts, he might well have stopped his inquiries, and for failing to go beyond the judgment of the court to examine into the power of James Pilant to make the transfer, to preclude him from the condition of an innocent purchaser, would be unreasonable. We therefore approve the judgment below, confirming the sale to Tuter, and ordering him to pay the residue of the purchase money owing by him for the land to appellant, and of the judgment against Davis for the amount which he had received from Tuter. And we also approve the judgment setting aside the conveyance to Davis, and ordering a surrender of the 24 acres and 13 poles of land retained by Davis to appellant. We also approve the principles upon which the accounts between the parties were ordered to be settled, except that Davis should be allowed so much for his improvements on the 24 acres and 13 poles as the same shall have enhanced the value of the tract at the time of the assessment, and for a refusal to allow him therefor alone the judgment is reversed, and the cause remanded, to have the value of said ameliorations ascertained, and for further proceedings consistent herewith. In all other respects the judgment is affirmed, and Davis and Pilant pay their own costs, and Tuter recover his costs of appellant Pilant.

Turner, Owsley & Burdett, for appellant.

Bradley, Anderson, Davis, for appellees.

EMIL FEHERENBACK v. ANDREW STRAUSS.

Land—Sheriff's Sale—Quashal—Innocent Purchaser—Negligence in Seeking Relief—Estoppel.

The negligent failure to seek relief, from a sale of land, by a sheriff until his vendee has sold the property and the legal title having been conveyed to an innocent purchaser without notice, will operate as an estoppel.

APPEAL FROM JEFFERSON CIRCUIT COURT.

September 24, 1867.

OPINION OF THE COURT BY JUDGE ROBERTSON:

After the appellant's negligent failure to seek relief from the sale of the house and lot until the sheriff's vendee had sold to Wood, and the legal title had been conveyed to Wood as an innocent purchaser, without presumable notice of any available defect in the sheriff's sale or levy, and without any intimation or apparent cause of apprehension of a purpose by the appellant to disturb him, and after the appellant, in his petition in equity, had alleged, without qualification, that the sheriff had levied the execution on the house and lot, it is too late to move a quashal of the sale on the alleged ground of an illegal or insufficient levy. The appellant's negligence and long and delusive acquiescence in the levy, and his expressed, as well as implied, recognition of its validity, should now operate as an estoppel.

But he has shown no essential defect in the levy. As indorsed on the execution, it is good. And as the sheriff notified the appellant that he would levy on the house and lot, that indorsement, whenever made on the execution in his hands, was sufficient to show authority to sell.

Wherefore the judgment dismissing the appellant's motion to quash the sale is affirmed.

Stite and Bullitt, for appellant.

L. A. Wood, for appellee.

LEWIS VERTREES AND WIFE v. THOS. S. RUSH ET AL.

Married Women—Sale of Land—Long Acquiescence.

Where there has been a long acquiescence in the sale of land by married women, who still survive, and the heirs of the deceased one are willing that the sale should be confirmed, and as a good title can be decreed, it is more equitable to sustain the sales than to set them aside.

Appeal by one of the Parties—Effect of Reversal of Judgment.

Although only one of a number of parties against whom a judgment has been rendered, appeal, the case will be reversed in its entirety if the controversy cannot be rightfully adjusted without it.

APPEAL FROM MEADE CIRCUIT COURT.

July 15, 1867.

OPINION OF THE COURT BY JUDGE WILLIAMS:

After the death of the testator, John Rush, Sr., and in February, 1839, the male legatees bought out the interest of the female legatees from their husbands in the lands devised jointly to all of them.

Lewis P. Rush and Jas. C. Rush bought 578 acres at \$3,000, to be paid in two equal annual installments, with interest from date, from Thos. S. and John Rush, Thos. Payne, the husband of Mary Payne, and Lewis Vertrees and A. Bell McGehee, husband of Elizabeth, as witnessed by their bond, and in which they agree to convey their interest, "*whenever the purchase money is paid, holding a lien on the aforesaid land for the purchase money until paid.*" At the same time Thos. S., Lewis P. Rush and James C. Rush and said Payne, Vertrees and McGehee, the husbands of the female legatees, sold their interest to John A. Rush, in 349 acres, at \$1,200, in like payments and with same covenants, and Thos. Rush bought under like conditions 348 acres at \$1,044. These payments not being made, and the executors, Thos. S. and Jas. C. Rush, having squandered the personal assets, and having become insolvent, appellants Vertrees and wife, in September, 1849, filed a bill to have the estate settled, and to assert a lien on the land for the purchase price. else to have the portion of Mrs. Vertrees assigned her, she never having either signed the bond or otherwise conveyed.

The executors, the surviving legatees, and the heirs of the deceased legatees, were made defendants. They also set up an assignment to them of Thos. Rush, and assert his lien upon the land.

Mrs. Tyler, the surviving relict of said A. B. McGehee, the heirs of Mary Payne, deceased, and the heir of Lewis P. Rush, being made parties, also ask for their respective interests.

After several references to a commissioner for reports, etc., it was finally submitted to a *pro tem.* judge, who, May 4, 1866, rendered a final judgment allowing to Vertrees and wife \$2,389.79 with interest from February 7, 1859; to Mary Payne's heirs \$889.49, with interest from same date; to Mrs. Tyler \$1,633.32, with a like interest, and to L. P. Rush's heirs, with same interest, \$1,830.35, and gave no lien upon the land. It further ascertained the indebtedness of Jas. C., Thos. S. and John A. Rush "to the estate," giving interest from same time.

There are at least two radical errors in this judgment, if the sales of the land be upheld, then each vendor is entitled to a lien on the lands sold for the unpaid purchase money, with interest from February 11, 1839, the date of the sales; if they be not upheld, then each is entitled to their share of the land in kind.

These purchasers did not become indebted to the executors or "the estate" for the amount of their purchase, but to those from whom they purchased.

To adjudicate the rights of the parties, as though the lands were assets in the hands of the executors, and to allow interest only from February 9, 1859, and give no lien, is to make a new contract for the parties detrimental to the vendors in two essentials: 1st, the loss of near twenty years' interest; 2d, the refusal of a lien to secure the payment of what money be due them.

The settlement with the executors should be made, separating the personal assets from the lands, and then the lands should be settled on the basis of the contracts and interest allowed, as therein provided, and a lien given on the lands, and to this end all payments made by the executors should be applied to the discharge of their liabilities as executors, unless where expressly made on account of the lands, and so applied.

The mutual purchasers should be affected so far as liabilities from one to another where so created, and only the remainder adjudged. Vertrees and wife will therefore only be allowed the

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balance due Thos. S. Rush after a discharge of his liabilities to his vendors on account of his purchase of land. As there has been a long acquiescence in these sales, and the married women who now survive and the heirs of the deceased one are willing that the sales should be confirmed, and as good titles may be decreed to the vendees, it would be more equitable to sustain the sales than to set them aside, yet, as these married women have never conveyed and have never released their liens for the unpaid purchase money, it would be entirely inequitable to decree their title from them without securing them in the payment of such sums as may be due them therefor.

Although none but Vertrees and wife appeal from the judgment, yet the controversy cannot be rightfully adjusted without its entire reversal, when, on its return, it should again be referred to a commissioner to ascertain the balance due each on the basis herein indicated, and then adjudged a lien upon the land for any unpaid purchase price due the respective parties, but not on account of the personal assets in the executor's hands. Wherefore, the judgment is reversed for further proceedings.

Walker, Harlan & Harlan, for appellants.

J. P. ORR ET AL v. JACOB C. HEDGER.**Appeal and Error—Pleading—Duties of Circuit Clerk in Making Transcript of Record.**

It is the duty of an appellant, in order to get a review by the appellate court, to file exceptions to the ruling of the court below in refusing to permit the filing of an amended answer, and then present and file a bill of exceptions making the rejected amended answer a part thereof, and incorporating them in the record. It is no part of the official duty of the clerk to state that the rejected pleadings are the same that he copies, and the appellate court cannot upon that unofficial statement so treat them.

APPEAL FROM OWEN CIRCUIT COURT.

January 17, 1888.

OPINION OF THE COURT BY JUDGE PETERS:

It seems that the amended answer setting up and pleading the cost of repairs, made upon the premises as a counter claim, was

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by leave of court filed, and time given appellee to reply, and on that branch of the cause a continuance granted.

Two other amendments were offered and rejected by the court, as the orders show, but whether those found copied in this record are the same which the court below rejected, this court is not furnished with the means of knowing, the mere memoranda of the clerk do not authorize this court so to regard them; if appellant desired to have the judgment of this court upon the sufficiency of his amended answer, he could only do so by excepting to the opinion of the court refusing him permission to file them, and then presenting and filing a bill of exceptions, making said rejected amended answer a part thereof, and thus incorporating them in the record, which is not done here. It is no part of the official duty of the clerk to state the rejected pleadings are the same as that of the copies, and this court cannot, upon that unofficial statement, so treat them; this principle has often been settled by this court.

As therefore the amended pleadings rejected by the court below are not properly before this court, the presumption is that the ruling of the court below was correct. And no error being perceived prejudicial to appellants, the judgment is *affirmed*.

Blackwell, for appellant.

JOHN BRUCE v. D. M. KITTINGER.

Trial—Parties to Suit—Summons.

In actions by equitable proceedings plaintiff shall be entitled to a trial at the first term after summons has been served on all the defendants, as provided by section 137 and section 395 Civ. C., where no issue of fact is made by the pleadings, or where the plaintiff consents that the statements in the answer may be taken as true. The service of process on one of the defendants and judgment thereon is error, other co-defendants not having been summoned.

APPEAL FROM M'LEAN CIRCUIT COURT.

January 18, 1868.

OPINION OF THE COURT BY JUDGE PETERS:

This action was brought in equity to attach a fund, or rather a debt, alleged to be owing by Bruce and wife to James Tichener, the insolvent debtor of appellee, as he alleges, and the proceeding is a regular suit in equity seeking to subject the debt alleged by Bruce and wife to said Tichener to the payment of appellee's debt *pro tanto*. Silas and James Tichener, Bruce and wife, and one Beckham were all made defendants. Summons was not served, either actual or constructive, on any of the defendants except Bruce and wife, and in that state of preparation judgment was rendered against Bruce for \$200, and he prosecutes this appeal.

By section 395, Civil Code, it is provided that the plaintiff shall be entitled to a trial in actions by equitable proceedings at the first term after the summons has been served on all the defendants, as provided in Sec. 137, where no issue of fact is made by the pleadings, or where the plaintiff consents that the statements of the answer may be taken as true.

By reference to this *section* it is apparent that appellee was not entitled to a trial at the term of the court at which the cause was heard. Tichener, his alleged debtor, should have been before the Court, and a judgment rendered against him, to authorize an appropriation of the debt owing to him by Bruce, to the satisfaction of his debt. Wherefore the judgment is *reversed*, and the

cause remanded, with directions for further proceedings consistent with this opinion.

Sweeney & Stuart, for appellant.

Bickers, for appellee.

ISHAM AND CELIA ALBRITTON v. P. D. THORNTON.

Pleading—Newly Discovered Evidence—New Trial.

After the adjournment of the court, whether upon petition or otherwise, it has no power to alter, change, or set aside any order or judgment made or entered by it while sitting as a court, but upon discovery of grounds for a new trial, after the term at which the judgment was rendered, an application may be made to the court by petition for a new trial, as provided by section 373, Civ. C.

APPEAL FROM CALLOWAY CIRCUIT COURT.

January 27, 1868.

OPINION OF THE COURT BY JUDGE PETERS:

This petition was filed in the Calloway County Court to set aside and vacate an order of said court, made some five months previous to the filing of said petition, binding two colored children to appellee, children of appellant Celia.

After the adjournment of the court, it had no power to alter, change, or set aside any order or judgment made or entered by it while sitting as a court, but by *section 373, Civil Code*. Upon discovery of grounds for a new trial, after the term at which the judgment was rendered, an application may be made to the court by petition filed with the clerk, and proceedings as prescribed in said *section*. By an examination of the petition in this case, it is apparent that the facts alleged present no sufficient grounds for a new trial; but if appellants are entitled to relief, it must be sought in a different *forum*.

As therefore the facts stated in the petition were not sufficient

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to constitute a cause of action, there was no error in dismissing the petition. Wherefore, the judgment is affirmed.

Rodman, Brown & Miller, for appellants.

Stubblefield, for appellee.

JOHN RICHARDS v. WESLEY COFER ET AL.

Alteration of Instruments—Bills and Notes—Release of Maker.

Adding the words "interest from the date" to a note after signature and delivery, and without the knowledge or authority of the maker, constitutes such an alteration as will release the maker from the whole amount of the debt.

APPEAL FROM HARDIN CIRCUIT COURT.

January 23, 1868.

OPINION OF THE COURT BY JUDGE ROBERTSON:

It appears satisfactorily that \$700 was the amount loaned, and that the note for \$770 was given for the loan and ten *per cent.* on it for a year. It also appears that, when signed by the appellee as surety, the note was complete for \$770 at the end of one year, without any blank. And it also appears that the words, "*interest from the date,*" were added by the creditor, after the full execution and delivery of the note, and without the authority of the appellee.

The legal conclusion is that this material alteration destroyed the appellee's obligation to pay any portion of the note.

Wherefore, the judgment of the Circuit Court to that effect was right, and is therefore affirmed.

Wilson, for appellant.

Cofe, for appellee.

JOHN P. SULLIVAN v. S. K. MALLONY.

Pleading—Instructions—Facts Alleged in Petition Not Controverted, Taken as Confessed.

A petition, on an account, charging rents upon land, for a stated period, imports an allegation that the lands were used for the time as charged and an answer which does not controvert this fact, is properly treated by the court as an admission, and an instruction predicated on this view is not erroneous.

Appeal and Error—Record Incomplete.

Where the record of a former suit between the same litigants is not copied in the record to the appellate court, it cannot avoid as grounds for an objection insisted on for the appellant that the cause of action was barred by a previous judgment.

APPEAL FROM TODD CIRCUIT COURT.

January 17, 1868.

OPINION OF THE COURT BY JUDGE HARDIN:

As no record of any former suit between the parties is incorporated in the record in this case, there is no apparent ground for the objection, insisted on for the appellant, that the cause of action was barred by a previous judgment.

The account referred to in the original petition as the foundation of the action charges the appellant with rent from the 25th day of February, 1860, to the 1st of January, 1863, and we think this account, with the amount of indebtedness in the petition referring to it, charging imports an allegation that the defendant used the premises from said 25th of February, 1860, to the 1st of January, 1863, and as the answer did not controvert this fact, the court properly treated it as admitted by the pleadings, and the instruction predicated on this view was not erroneous.

The bill of exceptions stating the action of the court as to instruction does not appear to have been signed by the court, but waiving this objection, we do not perceive any error to the appellant's prejudice in the ruling of the court in relation to instructions.

The verdict seems to have been authorized by the evidence certi-

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fied in the record, but if it was not, it is not stated in the bill of exceptions that that was all the evidence in the cause.

Wherefore, the judgment is affirmed.

Petrie & Bibb, for appellant.

Kennedy, for appellee.

W. H. SHUTT v. NANCY B. CHRISTIE, ADMRX.

Executors and Administrators—Pleading—Set Off.

In dealings between an administrator and his creditor, a debt due from a decedent cannot be set off against one due his administrator contracted to and with the latter.

APPEAL FROM M'LEAN CIRCUIT COURT.

January 18, 1868.

OPINION OF THE COURT BY JUDGE WILLIAMS:

Appellee sued appellant on a note executed to her as Admr. of N. J. Christee, deceased, by W. C. Mattingly and appellant. To this appellant pleaded as a set-off a note executed by the decedent, Christee, to W. C. Mattingly, etc., averring that the firm had been dissolved, and the note belonged to Mattingly, who had also died, and that he was the administrator and that he was only Mattingly's security in the note to Mrs. Christee.

To this she replied that her decedent had become Mattingly's security, and had the debt to pay, and she plead that as a bar to his set-off. The cause was submitted to the court, who dismissed the appellant's answer and the reply thereto without prejudice.

There is no bill of exceptions showing what or whether any evidence was heard, nor can we know whether any was heard, but we do know the court did right, for it is well settled that a debt due from a decedent cannot be set off against one due his administrator, contracted to and with the latter.

Judgment affirmed.

Bickens, for appellant.

A. G. WOOLRIDGE v. E. W. CABANISS.

Partnership Contract—Fees for Services Claimed by One Partner.

By the terms of a copartnership, one was to advance the funds necessary to conduct the business and the other to perform the services, profits, if any, to be equally divided. Afterwards, an express agreement was entered into to borrow money to make a larger investment: Held that this latter agreement would not change the original contract, unless there was a special agreement made and entered into, to allow fees for services rendered the firm, the presumption being that partners look to the profits for their compensation.

APPEAL FROM CHRISTIAN CIRCUIT COURT.

January 23, 1868.

OPINION OF THE COURT BY JUDGE PETERS:

By the terms of the contract of copartnership, appellee was to advance \$3,000 of capital to be invested in tobacco, to be purchased and put up by appellant, and the profits were to be divided equally, if any were realized, nothing to be charged for the use of the capital advanced by the one, nor for the services rendered by the other. These terms were not changed by any express agreement after the parties had determined to borrow the money, and make a much larger investment in the venture, and unless there is a special agreement that one partner shall be paid for services rendered the firm, he will not be allowed for such services, as the presumption is that the partners look to the profits for their compensation.

Lashbrook v. Lee, 8 Dana, 214-15.

Upon these principles the accounts between the parties were settled, in which no error is perceived.

Wherefore, the judgment is *affirmed*.

Phelps, for appellant.

Feland & Evans, for appellees.

WM. M. STARKS v. REUBEN, LORB & BLOOM.

Lasches—Attorney and Client—Duty of Client to Look After His Cause of Action.

It is the duty of a defendant to inform the court of the illness of his attorneys, where such facts are within his own knowledge, and to be present in court in person to see that no advantage was taken of him. And in the face of such facts a petitioner will not be acquitted of culpable negligence, or indifference and inattention to his interests.

APPEAL FROM M'ORACKEN CIRCUIT COURT.

January 22, 1868.

OPINION OF THE COURT BY JUDGE PETERS:

It is not alleged in the petition that both the attorneys employed by appellees during the whole term of the court were prevented from attending to their clients' cases by sickness, nor that they were for that cause prevented from being in court on the day on which the action was set for trial, or afterwards during the term, and were thereby prevented from discovering that a judgment had been rendered against him, until after the expiration of the term of the court.

But if appellant's counsel were both sick and unable to attend to his case, which would have been a sufficient reason for a continuance of it at that term of the court, if the judge had been informed of the fact, still it was the duty of appellant to be in court *himself*, when the case was called, to inform the court of the sickness of his counsel, and to see that no advantage was taken of him. He, however, fails to state that he was at any time present in court, or that he gave any attention whatever to the suits, and offers no excuse or reason for this absence, or his failure to inquire after the case.

The answer was not in the papers of the action in which the judgment was rendered, and there was no motion to consolidate the two actions, and it is not alleged that the court was informed that the answer lodged with the clerk was intended to apply to both actions.

The allegations of the petition are insufficient to acquit appellant

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of culpable negligence, or at least of indifference and inattention his interest, such as courts cannot favor.

Wherefore, the judgment is *affirmed*.

Harlan, for appellant.

Yersie, for appellee.

ALEX. SUND v. A. GRANT'S ADME.

Contract—Pleadings—Title by Delivery.

Where the allegations and proof fails to establish the delivery of wood sold under contract, or the setting apart of a quantity designated in the contract, this will not constitute title or delivery and no action on the contract will lie.

Same—Instructions.

An instruction in effect "that the plaintiff under the contract might recover the price of the wood, without showing actual or constructive delivery" is held erroneous.

APPEAL FROM JESSAMINE CIRCUIT COURT.

January 4, 1868. .

OPINION OF THE COURT BY JUDGE HARDIN:

The contract between A. Grant and the appellant does not, in our opinion, import a delivery of the one thousand cords of wood, or more than an agreement of the parties, whereby Grant undertook to furnish that quantity of wood, cut and stacked on the lands designated, which the appellant agreed to purchase at the price of \$2.50 per cord. To entitle the plaintiff to recover on the contract for the agreed price of the wood, it was therefore necessary, upon well settled principles, that by an actual delivery of the wood, or acts equivalent thereto, as measuring, setting apart or designating the 1,000 cords of wood, the title should have passed to the appellant. This is not shown to have been done by either allegation or proof. As the court, in effect, instructed the jury that the plaintiff under the contract might recover the price of the wood without

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showing such actual or constructive delivery, this ruling is deemed erroneous and fatal to the judgment.

We perceive no error in the ruling of the court prejudicial to the appellant, with respect to the alleged parol agreement of Grant to make a road for use in hauling the wood. But for the reason stated, the judgment is reversed, and the cause remanded for a new trial, and for further proceedings not inconsistent with this opinion.

Beck & Thornton, for appellant.

Bronaugh, for appellee.

B. W. PAYNE ET AL. v JAS. C. DITTO'S EX'ORS.**Warranty—Conflict of Evidence—Peremptory Instructions—New Trial.**

Where there is an apparent conflict of testimony, on a question of warranty, the jury should be allowed to decide the measure of damages, and a peremptory instruction is improper.

APPEAL FROM MEADE CIRCUIT COURT.

January 21, 1868.

OPINION OF THE COURT BY JUDGE ROBERTSON:

Whatever the jury might have been authorized to infer as to the character of the sale, or of the Jack, or of the cause of its frequent failures, or of the conduct of the appellants in not accounting for it, still there was some apparent conflict in the testimony on the question of warranty, which the jury ought to have been permitted to decide on the counter claim.

We are therefore of the opinion that, even though the evidence, all rightly considered, may have preponderated in favor of the verdict, yet the peremptory instruction to find it was erroneous. And for this cause the Circuit Court ought to have awarded a new trial.

Wherefore, the judgment is reversed, and the cause remanded for a new trial.

Kincheloe & Lewis, for appellants.

Walker, for appellees.

HENRY BURRIOK v. RICHARD BURNS.**Exceptions—Appeal and Error.**

Where the record does not show exceptions to the giving or refusing of instructions below, the Appellate Court cannot revise it.

Witness—Absence—Continuance—Drunkenness.

It is the duty of a defendant, knowing of the absence of a material witness, to move for a continuance; alleged drunkenness is no legal excuse for a defendant's absence and culpable neglect of his own case.

APPEAL FROM NICHOLAS CIRCUIT COURT.

January 31, 1868.

OPINION OF THE COURT BY JUDGE ROBERTSON:

The record shows no exception to the giving or refusing of instructions by the court; and therefore, even if there had been any error in that respect, this court could not revise it. The affidavit of the appellant did not entitle him to a new trial. The testimony of his absent witnesses could have had but little, if any, effect on the amount of damages, and the appellant ought to have known that the witness was absent, and have moved for a continuance; his alleged drunkenness is no legal excuse for his own absence and culpable neglect of his case.

Nor does the amount of the assessed damages entitle the appellant to a new trial.

This court cannot say that for such a battery resulting in such a disability, \$500 should be deemed so exorbitant as to indicate passion or prejudice.

Wherefore, the judgment is affirmed with damages.

Norvell & Ross, for appellant.

Stanton & Throop, for appellee.

I. D. OTIS AND BAIRD V. EDWARD BARKER.

Motion to Dismiss Appeal—Appeal and Error—Waiver.

Pending action on a motion to dismiss an appeal, the filing of a brief by appellee on the merits of the case does not constitute a waiver of the motion; the filing of the brief and motion to dismiss were simultaneous and intended to operate alternately.

APPEAL FROM JEFFERSON CIRCUIT COURT (C. P.)

January 4, 1868.

OPINION OF THE COURT BY JUDGE ROBERTSON:

The motion to dismiss the appeal was not waived or precluded by filing a brief on the merits of the case, because the brief and the motion to dismiss were simultaneous, and intended to operate alternatively.

The appeal was taken October the 24th, 1866, and the record was not filed in this court until November the 12th, 1867. Consequently, the appellee, not having waived his right to a peremptory dismissal for the non-filing of the record within the time prescribed by law, the court has no judicial discretion to overrule his motion. And we doubt whether, if the record had been filed in proper time, it would be available for reversal.

Wherefore, without much apprehension of loss or hardship to the appellants, their appeal is dismissed.

Thompson, for appellant.

Humber, for appellee.

E. A. FOGLE, EXR ET AL. v. BEN F. VIOLET.

Land—Decretal Sale—Bond for Purchase Price—Reasonable Time to Perfect Title—Resale—Difference in Price.

The purchaser of land at decretal sale will be required to execute bond for purchase money, if he can get a good title at the time of the sale or in a reasonable time thereafter, and in case of his failing to do so, the land may be resold and if it does not then sell for as much as he bid for it, he would be responsible for the difference.

Wills—Distinction—Proof of Contents.

Where a will has been destroyed by the burning of the clerk's office its contents must be satisfactorily established by competent evidence.

APPEAL FROM MARION CIRCUIT COURT.

November 23, 1867.

OPINION OF THE COURT BY JUDGE PETERS:

If appellants were in a condition to make appellee a good legal title to the land at the time of his purchase, or when the sale was reported to the court, or could, within a reasonable time thereafter, have procured such title to be made to him, he should unquestionably have been required to execute his bond for the purchase money, and in case of his failure and refusal to do so, a re-sale of the land should have been ordered, and if it did not then sell for as much as he bid for it, he would have been responsible for the difference between his bid and the price it brought at the second sale.

Whether, then, appellants have manifested an ability to make appellee such a title as he should be required to accept, must be first determined.

It may be assumed, as proved, that William Walston, at the time of his death, had the legal title to the land, and appellants contend that he disposed of it by his last will, directing it to be sold by his executors, and the proceeds to be divided amongst his five children.

Neither the will nor a copy was introduced on the trial, and the reason assigned for this failure is that the original was destroyed when the County Court Clerk's office of Marion County was burned; the burning of the office is incontrovertibly established, and the publication of a last will by William Walston, and the

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probate thereof by the proper court, and the burning of the original paper when the office was consumed, are facts which the evidence conduces to establish; but the contents of the will are not satisfactorily shown. Fogle proves the "will provided that there should be set apart to the widow one third, or dower in the land, and slaves, and the balance was to be sold." No other witness speaks of the contents of the instrument, and Joseph Walston, who was the draftsman of it, does not remember any of its provisions, except that Anthony and Albany Walston were named as the executors. Conceding that the executors had the power under the will to sell all the land, except the one third thereof, directed to be set apart for the widow of testator, and that by the sale to Ewing, and the sale and conveyance by Ewing and wife to Anthony Walston, he acquired the legal title to 110 acres of the tract, still as to the residue of sixty-two or three acres, there is no showing or pretense that, by his purchase, appellee got or could get a good title; it does not appear that the executors had the power under the will to sell the part set apart to the widow for dower, or that the reversionary interest therein passed by the will, and as to four-fifths of that part of the tract, it is not shown that Anthony had a legal or an available equitable title even.

As therefore appellants have not manifested an ability to invest appellee with a title to the land, either when the sale was reported or since, but as we have seen, were unable then to make him such title as he should be required to accept on account of the infancy of one of the title holders, and the lunacy of another, and took no steps to place themselves in a condition to procure a conveyance to be made, the sale to him should not have been enforced, and he cannot consequently be made responsible for the difference between the price he bid for the land and the price for which it sold at the subsequent sale.

Wherefore, the judgment is affirmed.

Harrison, for appellants.

T. C. Woods, for appellee.

NATHANIEL RITCHEY'S ADME. ET AL. v. GEO. W. SANDERS ET AL.

Personal Property—Adverse Holding.

The adverse holding of personal property for a period of five years give a perfect legal title.

APPEAL FROM GALLATIN CIRCUIT COURT.

November 27, 1867.

OPINION OF THE COURT BY JUDGE WILLIAMS:

Notwithstanding all the children and heirs of Nath'l Sanders, deceased, was estopped from setting up the will of 1824, on account of their written agreement not to do so, yet when G. W. Sanders did procure it, to be set up and recorded, and got possession of the two slaves, which he sold to Jno. A. Ritchey, after his mother's death in 1841, he claimed and held them as bequeathed to him under the will, and though he had taken out titles of administration, with the will annexed, his holding was adverse to the legitimate administrator and the other heirs.

But if this be not so, Ritchey having purchased one of the slaves in 1846, and the other in 1848, his holding from the time of his respective purchases was open and notoriously in his own right, therefore adverse, and the statute commenced and continued to run until he was made a party, and he having held for five years, his title became established.

Nor is he a *pendente lite* purchaser, for at the respective dates of his purchases there was no pending litigation, involving the rights of G. W. Sanders to said slaves.

The judgment against Ritchey's administrator and heirs was therefore wholly erroneous, and it is reversed, with directions to dismiss the proceedings against them absolutely.

Stevenson & Meyer, Lindsey & Lindsey, for appellants.

Jno. L. Scott, for appellees.

PHILLIP THURMOND v. N. R. BLACK.

Set Off—Counter Claim—Statutes of Limitation.

The statutes of limitation may run against a set off but not against a counter claim.

APPEAL FROM CRITTENDEN CIRCUIT COURT.

November 21, 1867.

OPINION OF THE COURT BY JUDGE WILLIAMS:

As Black owed Thurmond on notes, when he rendered the professional services established by the evidence, the value of those services should be applied to the payment of said debts, regardless of the statute of limitations set up by appellant to appellee's set-off and counter claim. But as the statute of limitations does bar a recovery on appellee's set-off, no judgment should be rendered in his behalf thereon.

The judgment being in accordance with these views, it is affirmed, both on the original and cross appeal.

Harlan, for appellant.

ANDREW POTTER ET AL. v JACOB RAMS.

Duress—Question of Fact.

The question of duress is a fact within the peculiar province of the jury to determine from the evidence and circumstances before them.

Pleading—When Answer of One Defendant Not the Answer of All.

The joint answer of all defendants to an action, sufficient as a plea of duress on the part of one of said defendants, does not present that defense as a bar to the action as against the other defendants who seek to avoid an obligation on the ground of a false representations of plaintiff in the procurement of their signature to a note.

APPEAL FROM PIKE CIRCUIT COURT.

September 13, 1867.

OPINION OF THE COURT BY JUDGE HARDIN:

The joint answer of the appellants, if sufficient as a plea of duress on the part of the appellant, Andrew Potter, does not pre-

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sent that defense as a bar to the action as against the other defendants, Ratliffe and Ranny, who seek to avoid the note only on the ground that they,

“relying on the false representations of plaintiff, signed the note sued on as sureties of their co-defendant, Potter, and for no other consideration whatever.”

If this defense was sufficiently pleaded it is not sustained by any such preponderating evidence as to authorize this court to disturb the verdict as to Ratliffe and Ranny, on the ground of an improper finding of the jury. Nor do we feel authorized to reverse the judgment on that ground as to Potter. Although the evidence strongly indicates an intention on the part of the appellee, upon meeting Potter before the note was given, to compel him to execute it or pay the amount, by force, it does not appear that Potter was under duress when he gave the note. Whether such was the case or not, it was the peculiar province of the jury to determine, from all the facts and circumstances of the case before them, and we cannot say, from the evidence in this record, that the verdict was not sustained by sufficient evidence.

No objection seems to have been taken to the instructions given by the court.

Wherefore, the judgment is affirmed.

Bowles, for appellants.

ALLEN W. RANTT *v.* LEWIS HARDIN.**Deposition—Exceptions.**

It not appearing that the exceptions of either party to the depositions were acted on in the court below, for this reason they must be regarded as unread.

Same.

If the depositions were not taken at the place designated in the notice and the adjournment from that place was unauthorized by the code, still the defendant was present, and cannot avail himself of such irregularity, if any existed.

APPEAL FROM BATH CIRCUIT COURT.

November 23, 1867.

OPINION OF THE COURT BY JUDGE HARDIN:

It does not appear that the exceptions of either party to depositions were acted on in the court below; for this reason they must be regarded as having been unread.

But we perceive no sufficient ground of objection to the reading of any of the depositions excepted to by the defendant. If they were not taken at the exact place designated in the notice, and the adjournment from that place was not such as authorized by the Code of Practice, the examiner's certificate shows the defendant was present at the taking of the depositions. Nor does it appear to us that the court abused its discretion in overruling the defendant's motion for a continuance.

The alleged partnership between the appellant and Hardin and John Rantt is, we think, established by a decided preponderance of the evidence. The report of the commissioner fixing the amount due the plaintiff, as agreed to by the parties, was not excepted to by the appellant, although the usual time was allowed for doing so. It seems to us the commissioner had a right to base his report on an agreed adjustment of the parties themselves, if made by them for that purpose before him; and if the report was not correct as to such agreement, or in any other particular, the defendant could have made the fact appear in the Circuit Court in the usual and proper mode.

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Wherefore, no special error being perceived in the judgment, the same is affirmed.

Gudgell, for appellant.

Lacey, for appellee.

J. Y. HARTFORD'S ADME. v. J. N. LEWIS.

Action—Pleading to—Too Late to Question Capacity to Sue.

It is too late to question the capacity of the plaintiff to sue after pleading to action.

APPEAL FROM SHELBY CIRCUIT COURT.

September 27, 1867.

OPINION OF THE COURT BY JUDGE PETERS:

After an issue of fact had been formed by the pleadings, and submitted to a jury, the court came to the conclusion that the petition did not contain a statement of facts sufficient to constitute a cause of action, and therefore ordered a jury to be withdrawn and the petition dismissed, and the propriety of that ruling is called in question by this appeal.

Unaided by any brief or suggestion from counsel for appellee, we are to search for whatever defect we can discover in the petition, and after a patient consideration of the subject, we confess our inability to make the discovery. We conclude that there is a mere matter of conjecture, that the objection to the petition must be that appellant failed to allege where the intestate died, and to designate the particular court from which the grant of administration was obtained.

But if that be the objection, we think it is not well taken. The allegation that the payee of the note was dead, and that plaintiff was duly appointed and qualified as his administrator, implies that the court, granting him letters of administration, had the jurisdiction to make the grant, and also that it was properly done. And if it were not so, he should have denied it in his answer; but

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having pleaded to the action, it was too late to question appellant's capacity to sue. Wherefore, the judgment is *reversed*, and the cause remanded for further proceedings consistent with this opinion.

Robert, for appellant.

A. G. ROBERTS ET AL. v TAYLOR ELLIOTT ET AL.

Contracts—Specific Execution—Petition Defective.

In a suit to enforce the specific execution of a contract the plaintiff must allege ability and readiness to convey the land in controversy to his vendee.

Purchaser—Legal Title—Sale Set Aside.

When the purchaser at a decretal sale cannot get the legal title, same will be set aside.

Vendor—Failure to Perfect Title—Rescission.

The vendor's failure to perfect his title to the land does not entitle him to a rescission of the contract to convey the legal title on the payment of the purchase money.

Cross-Petition—Summons.

Where a party is made defendant to the original action by amended pleadings, process on his cross-petition against the plaintiff is not necessary.

APPEAL FROM SHELBY CIRCUIT COURT.

September 13, 1867.

OPINION OF THE COURT BY JUDGE PETERS:

The petition of Elliott contained no allegations of an ability or readiness to convey the land to his vendee, consequently he was not entitled to a specific execution of the contract, nor to a judgment for a sale of the land for the satisfaction of the unpaid purchase money; and, as Floyd, the purchaser at the sale of the master, could not get the legal title, the same was properly set aside.

The judgment of sale, after sale by the master had been set aside, was, by consent of the parties, also set aside, and appellee, Elliott, then filed an amended petition, in which he made Moses

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Neal and E. A. W. Roberts defendants, and alleges that they have no interest in the land; that Neal on the — day of February, 1850, sold all his interest in the land to said appellee, by executory contract, for the sum of \$——, all of which had been paid, and that Neal was a non-resident of the State. He subsequently filed another amendment, alleging that he had purchased one-half of said land from Neal, and had paid him the whole of the purchase money therefor; that he had “made diligent efforts to procure a conveyance from him of his interest, and had endeavored to have him served with process, but had been unable to do so; that in fact he has been informed that said Neal has departed this life; that it being impracticable for plaintiff to perfect the title to said land, as required by defendant, and having acted in perfect good faith, he asks that the contract be rescinded, etc.”

The contract was cancelled on final hearing, of which appellants now complain.

The facts from which the conclusion is reached that appellee made diligent efforts to procure a conveyance from Neal are not stated; but from what appears in the record, no efforts whatever were made. In his first amendment he avers Neal was a non-resident, and then takes no warning, or other proper steps, to bring him before the court by constructive service, or otherwise. And if, as is intimated, he was dead, he fails to show any reason why the legal title could not be procured from his heirs; and if even the mere allegation of impracticability were sufficient to excuse him, and entitle him to the relief sought, he has wholly failed to show that.

Besides, E. A. W. Roberts, whom appellee makes a defendant to his action, alleges in his answer, which he makes a cross petition, that appellee informed him that A. G. Roberts had paid him the purchase price for the land, advised him to purchase the same, and promised to convey him the legal title, and that he purchased and paid therefor upon the assurances and representations of appellee; and this cross petition was, at the hearing, and is yet, unanswered, and must be taken as true. He was a defendant to the original action by amended pleadings, and process on his cross petition against the plaintiff below was not necessary, and the judgment was prejudicial to A. G. Roberts' vendee and unauthorized.

It is unnecessary to enter upon an examination in detail of the

state of accounts between Elliott and A. G. Roberts, but we suggest that, from the evidence, it seems that A. G. Roberts is entitled to credit for more than was allowed him, and it would be proper to refer that branch of the case to the master to ascertain and report the true state of accounts between the parties.

Wherefore, the judgment is reversed, and the cause remanded, with directions to permit appellant to perfect his title to the land by bringing the proper parties before the court for that purpose, and for making the necessary preparations for a final determination of the case, which are certainly very defective on both sides. The bond from Elliott to A. G. Roberts, although made an exhibit, is not filed, nor has E. A. W. Roberts filed or produced his assignment thereof, although he states in his cross petition he has done so.

Z. Wheat, for appellant.

Lindsey & Harwood, for appellees.

JOHN W. SNOW v. RUFUS K. DICK.

Redemption—Physical Restraint—Mental Disability—Excuse for Non-Tender.

Physical restraint and mental disability is an equitable excuse for not making a precise tender for redemption and a court of equity will require one to surrender this advantage and accept the amount to which he is legally entitled.

APPEAL FROM RUSSELL CIRCUIT COURT.

September 18, 1867.

OPINION OF THE COURT BY JUDGE ROBERTSON:

It seems to this court that the physical restraint and mental disability of the appellee constituted an equitable excuse for his non-precise tender for redemption, and that the appellant ought to have accepted the subsequent tender, and that, when he seeks the aid of a court of equity to obtain a substitute of his lost deed, the court, instead of granting such harsh and ungracious relief, should have required him, as it did, to surrender his hard and accidental

advantage, and accept the amount to which he is legally entitled for redemption.

Perceiving no error in the judgment, either in principle or detail, this court therefore affirms it.

A. MELCHER ET AL. v OBST & RUPERT.

Street Improvements—Contract With City—Ordinance—Grading and Paving District from Curbing.

Curbing is not included in an ordinance directing a street to be graded and paved and the mayor has no right to put it under contract and charge the cost to adjoining land owners.

APPEAL FROM JEFFERSON CIRCUIT COURT.

September 27, 1867.

OPINION OF THE COURT BY JUDGE PETERS:

It appears from the record of Obst & Rupert against Sweeney, etc., which by the pleadings is made an exhibit, that real estate in the city of Louisville belonging to appellants was sold by virtue of a judgment pronounced in said case against them for improvements made under an ordinance of the City Council on an alley in front of said property; this action is now brought against appellees, one of whom was the purchaser, to set aside said judgment and sale, and the chancellor, having refused relief to the full extent it was sought, appellants have brought the case to this court.

By the terms of the ordinance, the alley was to be "*graded and paved*," but the Mayor of the city entered into a contract with appellee Obst, by which he undertook to grade said alley, and to pave it, for certain stipulated prices, and to curb it at 56 cents per running foot from the curbing, whereby the cost of the improvement was very greatly increased, and the ordinance conferred no power or authority on the engineer to let, nor on the Mayor to contract for any curbing on said alley.

As was said in the case of Sweeney & McNeigh v. Obst & Rupert, curbing is not necessarily included in an ordinance for grading and paving, and unless there be sidewalks, it would be proper, and most probable curbing would be provided for in the ordinance; but, however this may be, curbing is as distinct from

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grading and paving as these are from each other, and unless the ordinance authorized the curbing, the engineer had no power to put it under contract; and if he does so, and the Council approves and affirms it, and it is by the Mayor stipulated for, and the work is performed, the city, and not the owners of the property fronting the improvement, must pay for it.

Wherefore, the judgment of the chancellor is *reversed*, and the cause is remanded, with directions to set aside the judgment against appellants, under which the real estate described in the pleadings was sold, and to set aside the sale, and that appellee Rupert be ordered to return the money paid to him by appellant, Mrs. C. Melcher, as evidenced by the two receipts, one dated August 2, 1866, and the other September 8, 1866, and for further proceedings consistent with this opinion.

S. J. ROGERS ET AL V. W. P. HAHN.

Street Improvement—Contract With City—Ordinance—Grading and Paving—Curbing No Part of Contract—Abutting Land Owners—Lien.

Curbing is not included in grading and paving and is as distinct as these are from each other and unless the ordinance authorizes the curbing the city has no right to put it under contract, but if it is done the city and not the lot owners are responsible.

APPEAL FROM LOUISVILLE CHANCERY COURT.

September 28, 1867.

OPINION OF THE COURT BY JUDGE PETERS:

This action was brought in 1865 against Preston Rogers, J. W. Barr, S. P. Hepburn, and appellants, to enforce liens on their several lots, which he alleges he has, by virtue of an ordinance passed the 16th of May, 1863, by the General Council and Mayor of the city of Louisville for grading and paving Underhill street, from the west line of the Bardstown pike to the east line of Broadway, at the cost of the owners of lots fronting said improvements, and a contract made with the Mayor of said city, with M. W. Redd, to make said improvements, and for the faithful performance on the part of Redd, appellee was his surety. Copies of the

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ordinance, contract, the report of the city engineer, and the warrants for the cost of said improvements are filed as exhibits in the case, and appellee alleges that the warrants for the cost of the work have been assigned to him by Redd, and that he is thereby entitled to the amount due by reason of said assignment.

Subsequently the action was dismissed as to Hepburn, Barr and W. Preston. And on the 7th of April, 1865, it appears that, on motion of appellant, leave was given him to withdraw the warrant filed against the defendant, S. J. Rogers, and on his further motion the cause as to said Rogers was dismissed as settled. In July afterwards, however, without any order having been made reinstating the cause against said Rogers, he filed his demurrer to the petition, and afterwards filed an answer, in which he does not rely upon the order dismissing the action as to him.. We assume, therefore, that it was inadvertently made, or was intended to be, and was certainly treated as having been set aside.

Upon final hearing, judgment was rendered against S. J. Rogers for \$104.41, with interest from the 26th of September, 1864, and for the further sum of \$713.04, with interest from the 6th of October, 1864, till paid, and against M. P. Pope for the sum of \$1,358.10 and \$725.78, with interest from the 24th of September, 1864, till paid, and for which several sums their respective lots have been sold; from which judgment Rogers and Pope have appealed.

From an examination of the report of the city engineer, it appears that a considerable portion of the assessment against appellants is for curbing done on said streets, when there was no ordinance for such work, and no authority conferred on the Mayor of the city to contract for the same; consequently appellants, as has been repeatedly held by this court, cannot be made responsible for said work.

In *Swneeney & McVeigh v. Obst, etc.*, MSS. opinion, September, 1866, an analogous case to this, it was said:

“Curbing is not necessarily included in grading and paving, and, unless there be sidewalks, generally unnecessary; and when there are sidewalks, it would probably be more correct to include the curbing; but however this may be, curbing is as distinct from grading and paving as these are from each other, and unless the ordinance authorize the curbing, the Mayor and engineer have no

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right to put it under contract. And if it is done, and the Council approve and affirm it, and permit the work to be done, the city, and not the lot owners, must be responsible."

We have before seen that the curbing was not provided for in the ordinance; consequently appellants are not responsible.

Wherefore, the judgment is reversed, and the cause remanded, with directions to set aside said sales of appellant's lots, and for further proceedings consistent with this opinion.

Appellee should be permitted to amend his pleading, and make the city of Louisville defendant to his action, if he should in reasonable time desire to do so.

Jno. W. Barr, for appellants.

Harris & Hagan, for appellee.

HARRISON THOMPSON ET AL. v HENRY BELL.

Bills of Exchange—Failure to Present for Payment or Pretext—Excuse—Liability of Endorsers.

Commercial intercourse having been entirely suspended between Kentucky and the city of New Orleans, at which place the bill was payable, at the time of maturity, the failure of the holder to present it for payment or protest at that time, did not operate to release the endorser.

APPEAL FROM FAYETTE CIRCUIT COURT.

September 16, 1867.

OPINION OF THE COURT BY JUDGE HARDIN:

It sufficiently appears that the appellee was the owner and holder of the bill of exchange in controversy before and on the 15th day of December, 1861, when the same matured, and was payable in the city of New Orleans, and that by the Civil War then being waged between various Southern States, including Louisiana, and the Government of the United States, and the States adhering thereto, including Kentucky, within which the appellee was, and resided, commercial intercourse between the State of Kentucky

and the city of New Orleans was entirely suspended, and so continued to be from the maturity of said bill, within the month of July, 1862.

The holder of the bill being thus inadvertently prevented from causing it to be presented for payment, or protested, the failure to do so did not, in our opinion, operate to release the appellants from this liability as indorsers.

This conclusion, which renders the consideration of other questions unnecessary, seems to us to be in accordance with the decisions of this court in the cases of Gravis against Tilford, 2 Drvall, 108, and Bell, Berkley & Co. v. Hall's Exrs., etc, in same volume, 292.

Wherefore, perceiving no available error in the judgment, the same is affirmed.

JOSIAH T. ASHURST v. SAMUEL BAILEY.

Pleading—Petition for Sale of Land—Unanswered.

A petition which alleges ability and readiness to convey land and states how title is derived, which is not an impossibility, is good, when unanswered.

Judgment for Sale of Land—Form and Substance.

It is error to adjudge that land be sold as a whole when it does not appear that it is not susceptible of division or to direct that the whole of the proceeds be paid to the creditor, although it might bring twice the amount of the debt.

APPEAL FROM SCOTT CIRCUIT COURT.

September 16, 1867.

OPINION OF THE COURT BY JUDGE PETERS:

The allegations of the petition were sufficient to entitle appellee to the relief sought; she alleges her ability and readiness to convey the house and lot to appellant, tenders him a deed therefor, and states how she derives title, which is certainly not an impossibility, for she might have been the next of kin to her husband, and upon his death has inherited the title to the lot, so that she showed by the averments in her petition, which were unanswered, that

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she was entitled to a judgment for her debt, and to a sale of the property for its satisfaction.

But the judgment itself, in form and substance, we cannot approve. Whether or not the property is susceptible of division does not appear. Be that as it may, the master is required to sell all the estate, even if it should bring twice as much as should be required to pay the debt, and then to pay over the whole of the proceeds of the sale, when collected, to appellee, after retaining \$30, his allowance for the sale and paying the costs of the suit. This, although an inadvertence in drawing the judgment, as may be presumed, is erroneous and prejudicial to appellant. Wherefore, the judgment is *reversed*, and the cause remanded, with directions to render a judgment conformable to this opinion.

T. C. BUTLER v. KNOTT & DUNHAM.**Bill of Exchange—Limitation—Subsequent Promise Must Be Alleged.**

When an action on a bill of exchange is barred by limitation, which is pleaded, and a subsequent promise to pay is relied on it must be alleged, and the statement that one deems himself bound for the debt cannot be construed to be an unconditional promise to pay.

APPEAL FROM JEFFERSON CIRCUIT COURT.

September 30, 1867.

OPINION OF THE COURT BY JUDGE PETERS:

It does not appear in the record what propositions of law was submitted to the jury as applicable to the facts proved, nor that any evidence was offered by appellant that was objected to or excluded by the court; consequently, if the judgment can be reversed, it must be upon the sole ground that the same is clearly against the weight of evidence. It is not certified in so many words that the bill of exceptions contains all the evidence introduced on the trial; but if, by a liberal interpretation thereof, it be conceded that it is in substance so sated, still we do not feel authorized to disturb the verdict. The proof does not show that appellees, or either of them, undertook or promised to pay the debt within five years after its maturity, and the statute of limitations

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is pleaded and relied upon by both of them. Brown proves that Knott stated to him that he had paid over to Dunham the one-half of the debt, which he intended to be applied as a payment *pro tanto* on said debt, and as "*he deemed* he was liable and bound" for the amount of the bill, "he would not make any defense to this action." This cannot be construed as an unconditional and direct promise to pay the debt, nor was it so regarded by Brown, because the action is brought on the bill of exchange, and a subsequent promise to pay the debt is not alleged. But the whole sentence is the expression by Knott of his belief that he was still bound to pay the debt, and while he continued in that belief, he would make no defense to the action. But after he became better informed on the subject he resolved upon a different course of conduct, as the result proved, for he did defend the action, and availed himself of all the defenses that he believed he could make effectual. And having succeeded, we perceive no error prejudicial to appellants, and the judgment must be affirmed.

M. THORNSBURY ET AL V. H. G. CHANEY.**Rebellion—Forfeiture of Property—Judgment of a Court.**

Though a defendant had taken up arms against his government he could not be deprived of his property until there was a judgment of forfeiture by a court of competent jurisdiction.

APPEAL FROM PIKE CIRCUIT COURT.

September 13, 1867.

OPINION OF THE COURT BY JUDGE PETERS:

The evidence authorizes the conclusion that appellee had been a soldier in the Confederate army, and whether or not he had been paroled by Col. Dills is not in issue, and is not material in this controversy, for if it were proper to arrest him, and appellant had an order from his superior officer to make the arrest, neither the commanding officer, nor appellant, had any legal power or right to take the property of appellee.

Even if he had taken up arms against his government, the military authority was not authorized to sit in judgment in the

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case, and he could not rightfully be deprived of his property, unless the property captured had been used to aid in the rebellion, of which there is no evidence, until there was a judgment of forfeiture by a court of competent jurisdiction to try and determine the question.

As therefore the instruction of the court below was not in conflict, but in accordance with this view, and the evidence authorized the verdict. No error is perceived, and the judgment must be *affirmed*.

H. MERRIFIELD v. WM. LUCAS.

Pleading—Petition—Mortgage Exhibits—Rule to File—New Trials.

When a petition discloses the existence of a mortgage and proposes to file it, it is in the power of the defendant to compel the plaintiff to do so, but if he fails to exercise this right, or to interpose any other objection to the judgment in the circuit court, the irregularity is not a cause for reversal.

APPEAL FROM RUSSELL CIRCUIT COURT.

September 18, 1867.

OPINION OF THE COURT BY JUDGE HARDIN :

The mortgage, from the appellant to the appellee, as copied into the transcript by the clerk from the County Court records, cannot be regarded by this court as part of the record.

Disregarding the mortgage, and the facts it tends to disclose, as to the personal property mortgaged, the only question which we deem important in the case is, whether the failure of the plaintiff to file the mortgage, as an exhibit proffered by him, is an available cause of reversal in this court.

The mortgage is referred to as an exhibit, but is not made part of the petition, which seems to prevent a valid cause of action upon its face. As the petition discloses the existence of the mortgage, and proposes to file it, it was in the power of the defendant to compel the plaintiff to do so by a rule, but failing to exercise this right, or to interpose any other objection to the judgment in the Circuit Court, the irregularity is not a cause for a reversal in this court.

Wherefore, the judgment is *affirmed*.

THOS G. QUINN v. S. T. J. COLEMAN ET AL.

Courts of Foreign States—Jurisdiction of Person—Restraining Sale of Land in this State—Defective Title.

Where a deed to land in this state has been adjudged a mortgage by a court of an other state that court having jurisdiction of the person, may restrain the grantee in said deed from selling the land.

September 13, 1867.

OPINION OF THE COURT BY JUDGE WILLIAMS:

The deed from Mrs. Frazer to Jno. Hill of the land in controversy, dated in November, 1858, recites a consideration of fifteen thousand dollars.

This deed, on petition of Frazer v. Hill, was adjudged to be a mortgage by the Superior Court of Cincinnati, Ohio, where the vendee, Hill, lived, and which had jurisdiction of his person, and to restrain him from proceeding to sell said land under said deed, or to execute the trust which it did, and said judgment and restraining order has never, so far as the record of said court shows, been dissolved or discharged, and Frazer, having substantially complied with the judgment of the court by paying the mortgage debts, there is no apparent reason why the injunction should be disturbed.

This injunction was in full force, so far as appears from the record, when John Hill, by deed dated July 17, 1863, attempted to convey this land to A. P. Hill for the recited consideration of *two hundred dollars*; nor has it been since disturbed, so far as appears in this record. A. P. Hill was the attorney of John Hill, negotiated the loan to Frazer, drew the deed and power of attorney from the latter to John Hill, drew the answer and conducted John Hill's defense to Frazer's suit; therefore had full knowledge of everything in the record, and must have known that the deed of John Hill to him was in utter disregard of said injunction.

A. P. Hill claimed a fee of two hundred dollars from Frazer, and claimed that this attached to John Hill's mortgage, as is apparent from the latter's answer in the Ohio suit, and we must presume that this deed from John Hill to him was for the purpose

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of securing this claimed fee, notwithstanding the court had rejected it as a mortgage claim, and thus to obtain an illegal advantage, he caused his client to make an illegal deed, in violation of the order of injunction, and this illegality taints all the subsequent deeds.

The recited consideration of \$200 in John Hill's deed to A. P. Hill for premises, his deed from Frazer recited a consideration of \$15,000, was so wholly insignificant as to arouse a vigilant inquiry upon the part of even an ordinarily prudent subsequent vendee, and especially of Sower, whose deed from A. P. Hill bears the same date of John Hill's deed to A. P. Hill.

Frazer seems to have remained in possession of the land until some of the appellees, proceeding in the Kenton Circuit Court to foreclose their mortgage on these premises made by Frazer, had the premises put into a receiver's hands, to be rented out and the rents marshalled to pay on these mortgaged debts, Coleman having rented from the receiver, Quinn, by some means, seems to have gotten a tenant on the land after the court ordered it into a receiver's hands, but none of the vendees, from A. P. Hill down to him, seem ever to have held by possession. Miller, who seems also to be a lawyer by profession, and to have claimed a fee of \$200 from old man Frazer, appears mainly to have been instrumental in procuring Quinn, the appellant, to purchase this land of Davis, who had purchased of Sower, not only telling Quinn that the title was good, when he knew the court had already decided that Frazer's deed to John Hill was a mortgage, and had enjoined him from selling the premises, but concealed from Quinn the pregnant fact that John Hill only held a mortgage, which was then fully discharged, but referred him to A. P. Hill, Miller's confederate in trying to wring from old man Frazer an unconscionable fee of \$400, and thus Quinn was duped by those interested, which need not have been had he inquired of those tenants who had the place under rent from the receiver of the Kenton Circuit Court.

The facts and circumstances should have admonished any ordinarily prudent purchaser of the situation of this title, and if Quinn, who seems to have been an unsuspecting purchaser, has been overreached by Miller or A. P. Hill, he should look to them for reimbursement, as both of these gentlemen appear rather ungracefully upon this record.

The Circuit Court properly discharged Quinn's injunction and dismissed his petition.

Wherefore, the judgment is affirmed.

Hawkins & Carlisle, for appellant.

Stevenson & Myers, for appellees.

WM. ALLIN v. ARMSTEAD BOWEN.

Land—Sale of by Tract—Quantity—More or Less—Validity of Sale.

Where land is sold by the tract, the actual quantity, more or less, cannot invalidate the sale.

APPEAL FROM CLARKE CIRCUIT COURT.

September 16, 1867.

OPINION OF THE COURT BY JUDGE ROBERTSON:

The land is sufficiently identified by the record; and having been sold *by the tract* as containing about 62½ acres, whether it contains precisely that quantity or only 70 or only 50 acres, the actual quantity, more or less, cannot invalidate the sale, especially as Allin, the owner, represented it as a tract of 62½ acres.

And seeing no reason for setting the sale aside, this court cannot reverse the judgment, which is therefore affirmed.

M. E. PIERCE V. COBB, CHRISTY & Co.**Infants—Service of Summons On.**

Where the defendant is an infant under the age of 14 years, the service must be on him and his father or guardian if to be found, if not then upon his mother or any other person having the care or control of him. When the infant is over 14 years it must be served on him

Sheriff's Return.

When the sheriff's return shows that the summons was served on the father and his infant daughter, it will be presumed, in the absence of proof, that the infant was under the age of 14 years.

APPEAL FROM CAMPBELL CIRCUIT COURT.

September 14, 1867.

OPINION OF THE COURT BY JUDGE HARDIN:

On the question as to the service of process on the infant appellant, we incline to the opinion that the facts returned by the sheriff show a valid service, according to the 81st section of the Civil Code, even if it sufficiently appeared that the appellant was at the time under 14 years of age. Said section provides that—

“Where the defendant is an infant, under the age of 14 years, the service must be upon him and his father or guardian; or, if neither of these can be found, then upon his mother, or any other white person having the care or control of the infant. Where the infant is over 14 years of age, service on him shall be sufficient.”

The sheriff's return on the attachment states that he delivered a “summons to Daniel Pierce and to Mary Elizabeth Pierce, his infant daughter.”

But it is not distinctly shown that the appellant was at the time under 14 years of age. In the absence of satisfactory proof to the contrary, the sheriff must be presumed to have done his duty under the sanction of his oath; and we do not think the mere expression of an opinion by a single witness that the party was “about thirteen years of age” is sufficient to repel the presumption that the officer properly served the summons upon due inquiry and information as to the age of the infant.

Without renewing at length the transactions and proceedings

leading to the judgment now before this court for revision, it seems to us the judgment and return of the execution there in the Kenton Circuit Court sufficiently established the indebtedness of Daniel Pierce to the appellants, and his insolvency; and we think it was further sufficiently established that the purchase and conveyance from Welch to the appellant was procured and the consideration thereof paid by Daniel Pierce, without any valuable consideration from the appellant, and was fraudulent as to the appellees, whose debt existed prior to said purchase and conveyance, and that the judgment was unauthorized by the pleadings and evidence in the cause.

Wherefore, the judgment is affirmed.

Hallam & Webster, for appellant.

Hawkins & Root, for appellee.

MALVINA ELDER ET AL. v. ALEX. C. LUCAS.

Personal Representation—Suit on Bond—Form of Judgment.

By failure to answer the appellant admits that she has assets in her hand sufficient to pay the debt, but the judgment is rendered against her *de propriis bonis*. Held that the judgment cannot be sustained in the form in which it is rendered, it should have been rendered to be levied of assets in her hands.

APPEAL FROM SCOTT CIRCUIT COURT.

September 16, 1867.

OPINION OF THE COURT BY JUDGE PETERS:

This action was brought by appellee against Mrs. Elder, as the personal representative of Napoleon McDowell, deceased, who was his guardian, James C. Lemon, as the surety of said McDowell in his guardian bond, and William Lucas, as the surety of Mrs. Elder in her administration bond, to recover of them the sum of about two hundred dollars, alleged to be due and owing him by the personal representative of said McDowell.

Process was executed on Lemon and Mrs. Elder, and returned as to Lucas, that he was no inhabitant of the county.

GILKEY ET AL. V. TIPTON ET AL.

Opinion of the Court.

At the May term, 1866, of the Scott Circuit Court a joint judgment was rendered against the defendants, upon whom the process had been executed, they having failed to answer, and the cause continued as to Lucas, and Mrs. Elder and Lemon have appealed.

The facts stated in the petition constitute a good cause of action against appellants, in the respective characters in which they are sued; and as Mrs. Elder was sued in her fiduciary character, and the judgment is rendered against her *de propriis bonis*, the only question is, can the judgment be sustained in the form in which it is rendered? That question, we think, must be answered in the negative.

By failing to answer, Mrs. Elder admits that she has assets in her hands of her intestate sufficient to pay the debt, but whether she admits it, or had denied it in an answer, and assets had been found in her hands sufficient to pay the demand by the verdict of a jury, still in neither event would the court below have been authorized to render a personal judgment against her; but it should have been rendered to be levied of assets in her hands to be administered. (*Botts' Admr. v. Fitzpatrick*, 5 B. M., 397).

Wherefore, the judgment being erroneous, is reversed, and the cause remanded, with directions to render judgment as her-in directed, and for further proceedings consistent herewith.

Polk & Campbell, for appellants.

Shepherd, for appellees.

CHAS. GILKEY ET AL. v. O. H. TIPTON ET AL.

Land—Equitable Title—Wills—Descent—Collateral—Kindred.

Tipton executed his title bond to his son-in-law, Gilkey, for 100 acres of land and upon the payment of the purchase price was to make a deed. Gilkey paid one-half of the price of the land and the other half having been given to him as an advancement by Tipton. After this, and before her father's death, Mrs. Gilkey died, leaving one child, a son. Her father then died intestate; Gilkey then died intestate leaving all his property to his said minor son, and then to his brother in case his son should die without issue. The land was conveyed to young Gilkey by commissioner's deed. Young Gilkey having died intestate and without issue; the question is whether the contingent devisees of the elder Gilkey take the

Opinion of the Court.

land or the collateral kindred of young Gilkey, on his mother's side: Held that the title passed to the contingent devisees under the will of the elder Gilkey.

APPEAL FROM MONTGOMERY CIRCUIT COURT.

September 17, 1867.

OPINION OF THE COURT BY JUDGE WILLIAMS:

January 1, 1846, John P. Tipton executed his title bond to his son-in-law, David T. Gilkey, for one hundred acres of land, at the price of \$35 per acre, to be paid in three equal annual installments, and upon payment Tipton was to convey the land by general warranty deed.

After this, and before her father's death, Mrs. Gilkey died, leaving one child, a son.

Her father then died intestate, and in the settlement of his estate, D. T. Gilkey asserted that he was only to pay one-half of the purchase price, the other being an advancement by his father-in-law. D. T. Gilkey then died testate, leaving all his property to his minor son, by his deceased wife, and then to his brothers in case his son should die without issue. The judgment settling the rights of the intestate Tipton was brought to this court for revision, in which this court held that Gilkey "was to pay one-half, and for the value of the other half, \$1,750, he was to account as an advancement; the court also ordered a conveyance to the minor son of Gilkey, which was afterwards consummated by the commissioner's deed, but in which a mistake as to the name of the young Gilkey was made.

The young Gilkey having died intestate and without issue, this suit was brought by his collateral relatives, on his father's side, and who were the contingent devisees, under his will, against the collateral relatives on the mother's side, to have said deed corrected, and for the possession of the 100 acres described in the title bond of J. P. Tipton to D. T. Gilkey, and for a division of his other estate. The other estate was, by judgment of the court, equally divided between the collaterals of the father and mother, of which there is no complaint. But the 100 acres was adjudged to the mother's kindred, and this is the sole error complained of.

It is a simple question whether the young Gilkey derived the

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land from his father or mother, for if from the former, the judgment is erroneous; if from the latter, it is right.

The mother died before her father, therefore she could inherit nothing from him.

What she took from her father must therefore have been by gift, and if of land, must be evidenced by writing; the only writing exhibited relative to this 100 acres is a title bond to her husband to convey to him by general warranty deed in consideration of \$3,500 to be paid.

The husband proved, in the first case, that one-half of this price—that is, \$1,750—was given to him as an advancement, and therefore he was only required to pay the other \$1,750. It is very evident that there was no partition of the land into 50 acre tracts, nor was there a sale by such lots; it was a sale in gross, and all the land stands on the same footing, and all derived by the minor son from the same parents.

To say that Tipton gave to his daughter, Mrs. Gilkey, fifty acres of land is to contradict the only written evidence of the title. To say, as this court did say, that Tipton gave to his son-in-law one-half the purchase price of the land by way of advancement is to conform to the written obligation, and still settle the matter according to the proof, and violate no rule of law.

It was a sale of the land to the son-in-law, and a gift of one-half of the purchase price to him as advancement. If the bond be adhered to, the equitable title was in D. T. Gilkey, and which he devised to his minor son; if the bond be not adhered to, then his grandfather, and his father would lose his entire purchase and the \$1,750, which he actually paid out of his own means.

Had the conveyance of the 100 acres been consummated by a deed in conformity to the bond, there could be no rational doubt as to the parent from whom the minor son would derive it; this, however, not being done, cannot alter either the source whence he derives the land, nor change the rights of the parties.

The court radically erred in adjudging any part of the 100 acres to the collateral kindred on the mother's side, but should have adjudged that it passed according to the last will of David T. Gilkey.

Wherefore, the judgment is reversed as to the 100 acres of

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land, with directions to the court below to render judgment in accordance to this opinion.

Turner & Seaver, for appellants.

Houston, Brock, for appellees.

WILLIS FIELD v. AMBROSE YOUNG ET AL.

Trusts—Jurisdiction of Circuit Court.

A circuit court has jurisdiction to effectuate a trust by the sale of land to relieve it of encumbrance and to reinvest the surplus for the beneficiaries.

Same—Mode and Time of Sale—Discretion of the Court—Consent of Infants.

No other law than the deed of trust and the sound discretion of the court prescribes the mode or time of sale. The court has the power to make a sale without the consent of the infant beneficiaries.

Deed of Trust—Grantor's Capacity—Purchaser at Decretal Sale Secure—Impeachment.

When the evidence preponderates in favor of the grantor's capacity, and there is no implication of fraud or improper influence and the court having so adjudged, the purchaser will be secure against any probable impeachment of the deed hereafter.

APPEAL FROM WOODFORD CIRCUIT COURT.

September 20, 1867.

OPINION OF THE COURT BY JUDGE ROBERTSON :

The Circuit Court had jurisdiction to effectuate the trust by a sale of the land to relieve it of encumbrances, and to reinvest the surplus for the use of the beneficiaries. And no other law than the deed itself, and the sound discretion of the court, prescribed the mode or time of sale. The mode and time adopted by the decree of sale seem to have been reasonable and proper, and were not illegal. The sale itself seems to have been fair to all parties,

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and to have been substantially conformable with the order of sale.

The proceeding was not under statutory authority for the benefit of infants. The court had power to make the sale, without the consent of the *infant* beneficiaries, but they were parties, and will be *concluded*.

The evidence, intrinsic and extrinsic, preponderates in favor of the grantor's capacity; and there is no implication or fraud or improper influence, and the court, having so adjudged, the purchaser will be secure against any probable impeachment of the deed hereafter.

Nor do we consider any other exception to the sale to be available.

Wherefore, the judgment overruling all the exceptions and confirming the sale is approved and affirmed.

McLeod, for appellant.

Kinkead & Buckner, Porter & Greathouse, for appellee.

JOHN M. DELPH v. JOHN FINNEL ET AL.**Contracts—Lease—Forfeiture—Non-Payment of Rent.**

Where by the terms of a lease it is stipulated that the lessor may re-enter, upon the failure to pay rent, the lessor may annul the contract and is entitled to the possession.

Written Contract—Loss of Improvements.

The lessee having failed to execute the written contract for the rent of the premises the lessor was entitled to recover the possession. But as such recovery would involve the loss of the improvement the lessee may elect to execute the writing or submit to eviction.

September 30, 1867.

OPINION OF THE COURT BY JUDGE HARDIN:

Although, by the terms of the lease to Finnell, the failure to pay the stipulated rent of the 22 feet of ground within 30 days after any installment should be due, the appellant was entitled to

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re-enter the premises, and annul the lease, yet, as the petition does not seem to seek a forfeiture on that ground, but on the ground of an alleged failure of the appellant to execute and perform the new contract, for the leasing of the same ground enlarged by the adjoining 20 feet of ground, it seems to us the court did not err in refusing to annul the lease.

We are of the opinion that the plaintiff was entitled to recover of the appellee, Kehol, a rent of sixty dollars per annum for the use and occupation of said adjoining ground of 20 feet front, the averments of the petition being deemed sufficient for that object, and it appearing from the evidence of O'Neal and Dunn that, although Kehol did not execute the written lease, signed by the appellant, he did agree with him to rent the ground, and his subtenant erected a kitchen on it, which became part of the premises rented by the appellee's agent to Dunn.

There being no written contract for the rent of the 20 feet of ground executed by the appellee Kehol, the plaintiff was also entitled to recover the possession of it, unless the said appellee would execute the lease in writing. But as such a recovery would involve the loss of improvements, it seems to us, for this and other reasons, that Kehol should be allowed, on the return of the cause, to elect whether he will execute the written contract, or submit to a judgment of eviction as to the 20 foot lot.

Wherefore, the judgment is reversed, and the cause remanded for further proceedings consistent with this opinion.

Harrison & Bennett, for appellants.

H. Pope, for appellees.

JAMES GARVIN'S EXOR. v. WM. GARVIN.**Wills—Construction—Second Bequest—Codicil—Revocation.**

A second request in a will or codicil thereto may operate constructively to revoke a former one without an express statement in the will or codicil that such was the testator's intention, yet to authorize such a construction the intention of the testator to give the last legacy in lieu of the first must be fairly deducible from the testamentary writing itself.

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APPEAL FROM LOUISVILLE CHANCERY COURT.

September 26, 1867.

OPINION OF THE COURT BY JUDGE HARDIN :

Although it is true, as insisted for the appellant, that a second bequest in a will or codicil thereto may operate constructively to revoke a former one, without an express statement in the will or codicil that such was the testator's intention, yet to authorize such a construction, the intention of the testator to give her last legacy in lieu of the first must be fairly deducible from the testamentary writing itself. There does not seem to be any such inconsistency between the intention as expressed in the 22d clause of the will of James Garvin, to appropriate \$5,000, to be bestowed by William Garvin "upon such religious or charitable objects as he may see fit," and the subsequent provision for his, as one of the residuary devisees; nor is the latter provision accompanied by any such qualifying or explanatory words as would be sufficient, in our opinion, to work a revocation of the bequest of \$5,000, made as it was for peculiar reasons for objects and purposes not individually beneficial to William Garvin. And as the judgment of the court below conforms to our construction of the will, the same is affirmed.

W. F. Barrett, W. R. Thompson, for appellant.

Gazlay, for appellee.

DAVID CLEAVER v. W. P. BEAUCHAMP.**Summons—Correction—Return by Sheriff—Petition Taken for Confessed.**

The court properly allowed an amendment of the return on the summons showing the service was not on Sunday as the original by mistake imported, and the return that the order taking the petition for confessed was not premature.

Injunction—Reversal of Judgment—Effect to Dissolve.

The judgment of the court of appeals reversing a judgment perpet-

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uating an injunction and remanding the case for only an assessment, etc., had the legal effect to dissolve the injunction.

Appeal Bonds—Injunction Bonds—Liability—Confessed—Failure to Answer. Same—Preliminary Suits.

The entire liability being confessed by failing to answer the allegation charging it, there was no necessity for preliminary suits on the appeal and injunction bonds.

APPEAL FROM MARION CIRCUIT COURT.

July 3, 1867.

OPINION OF THE COURT BY JUDGE ROBERTSON:

Upon the affidavit of the Deputy Sheriff who executed the summons on the appellant Cleaver, the Circuit Court properly allowed an amendment of his return, showing that the service was not on Sunday, as the original return imported by a mistake as to the day of the month when the summons was served. And the return, as thus corrected, showing that the order taking the petition for confessed was not premature; that judgment was right.

The judgment of this court reversing that of the Circuit Court, perpetuating the injunction in which the appellant Cleaver was surety, and remanding the case for *only* an assessment of rents, improvements and deterioration, had the legal effect of dissolving the injunction. But the petition moreover alleges that the injunction was dissolved; and that allegation was confessed. Cleaver therefore appears to be liable for the rents, which, among other things, had been enjoined. That liability commenced with the execution of the injunction bond. He appears to be liable also on the appeal bond for rents due before the injunction.

This entire liability being confessed by failing to answer the allegations charging it, there was no necessity for preliminary suits on the appeal and injunction bonds to fix the liability.

Nor was there any necessity for an assessment of rents, improvements and waste; because the petition charges that the waste was equivalent to the improvements, and that the rent was worth \$50 a year, and those allegations were confessed. Consequently, the judgment being for the rent only at the rate of \$50 a year, we see no substantial error in it to the prejudice of the appellant Cleaver.

Wherefore, the judgment is affirmed.

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M. G. CARTER v. S. EIFORH.

New Trial—Newly Discovered Testimony—Affdavits.

On an application for a new trial, based on the grounds of newly discovered evidence, where not sustained by the affidavits of others than the appellant, the court is not authorized to grant a new trial on that ground alone.

APPEAL FROM CARTER CIRCUIT COURT.

July 4, 1867.

OPINION OF THE COURT BY JUDGE HARDIN:

The fact that Ghent, one of the jury, was one of the command of which the appellee was acting as Colonel at the time the mule is alleged to have been taken from the appellant was not, in our opinion, a sufficient reason for granting a new trial, and as the application for a new trial, so far as it was based on the ground of newly discovered testimony, material for the appellant was not sustained by the affidavits of others than the appellant, the court was not authorized to grant a new trial on that ground.

The instructions are not copied in the record, and there is nothing before us to show that the court restricted the jury. As it was the province of the jury to decide upon the facts of the case, and the evidence does not seem to so preponderate against the verdict as to show the jury to have been controlled by passion or prejudice, we do not feel authorized to disturb their verdict, on the ground that it was not sustained by the evidence.

Wherefore, perceiving no reasonable error in the judgment, the same is affirmed.

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HANNAH CLARK v. W. P. BEAUCHAMP.

Deeds—Procurement—Absence of Fraud—Contents Understood.

Where the proof fails to show any fraud on the part of the grantee in the procurement of a deed, or that the grantor did not thoroughly understand its contents and voluntarily executed it, the court will not set it aside for minor causes.

July 3, 1867.

APPEAL FROM MARION CIRCUIT COURT.

OPINION OF THE COURT BY JUDGE PETERS:

At the execution of the deed the evidence shows that the subject was discussed by appellant in the presence of the subscribing witnesses, and she persistently refused to sign it until it was so changed as to leave her about ten, or nearly ten, acres more land than would have been left to her, if she had signed it, as it was at first presented to her.

Her husband, in his lifetime had contracted to sell both parcels of land to appellee; it does not appear that she was averse to that sale, and by the writing evidencing that contract filed as an exhibit in this case, two hundred dollars, one-half of the price at which the tract containing 112½ acres was sold, were secured to be paid to her, and that she can get whenever she is willing to surrender the possession of that part of the land which she retains to appellee; which, according to the evidence, is equal in value to one-third of the two tracts.

The proof fails to show any fraud on the part of appellee in the procurement of the deed, or that appellant did not thoroughly understand its contents, and voluntarily execute it. No error is perceived in the judgment, wherefore the same is *affirmed*.

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J. T. WILLIAMSON v. O. E. JONES.

Land—Judgment of Sale—Affidavit as to Personal Property.

It is error to adjudge the sale of land in the absence of an affidavit that the defendant has no personal property.

Same—Reasonable Time for Excepting to Report of Sale.

Less than three days has never been recognized as a reasonable time to accept a report of sale.

Resersal of Judgment of Sale—Restitution.

Upon the reversal of a judgment of sale of land the owner is entitled to restitution, where the creditor is the purchaser notwithstanding he has transferred his purchase to a stranger.

APPEAL FROM CAMPBELL CIRCUIT COURT.

July 2, 1867.

OPINION OF THE COURT BY JUDGE ROBERTSON:

The appellee's house and two lots, worth, as we may infer, at least \$1,000, were sold for about \$127 by an unusually precipitate procedure against him as a non-resident, without actual notice. The judgment for the sale and confirmation of it was erroneous for at least two reasons: First, there was no affidavit that the appellee had no personal property sufficient to pay the debt, as required by the 251st section of the Code of Practice, and a decision thereon in Payne against Witherspoon cited in the notes. Second—Reasonable time for excepting to the report of sale was not allowed. This court has never recognized less than three days as reasonable time; but, in this case, the report was prematurely confirmed the day after it was filed.

Wherefore, the judgments of sale and confirmation were erroneous, and are therefore reversed. The creditor having been the purchaser, this reversal would entitle the appellee to restitution of the property sold, had there been no transfer to the appellant. And, as he was only substituting as the purchaser, he must, as hitherto adjudged, be considered and treated as standing in his shoes.

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Wherefore, the Circuit Court properly vacated the conveyance to him; and we see no error in the allowance of rents.

Wherefore, the judgment appealed from is affirmed.

THOS. JOHNSON ET AL. v. J. K. WADDY.

Slaves—Contract for Hire.

The principal is well established that the hirer of a slave for a particular term is not exonerated from his obligation to pay the price by the death, escape or abduction of the slave.

APPEAL FROM CALDWELL CIRCUIT COURT.

February 7, 1867.

OPINION OF THE COURT BY JUDGE HARDIN:

This was an action against the appellants, upon a covenant executed by them to the appellee on the 2d day of January, 1865, for the hire of two negro boys for the year 1865, at the price of \$200, the covenant stipulating that the obligors would pay the two hundred dollars, whether the negroes should serve the entire year or not, and without regard to the time they might serve.

The appellants filed an answer alleging, substantially, in separate paragraphs:

1. That on the day the slaves were hired, and before they had rendered any service, "two white men, dressed in the uniform of the Federal Government," "who," the answer alleges, "were negro kidnappers," together with a company of negroes, forcibly took said slaves out of the possession of the appellant Johnson, without authority of law, and that said persons who took them were public enemies of the State of Kentucky, and the laws and institutions thereof, and that by reason of said unlawful taking, appellants were deprived of the entire services of the slaves for said term of hiring.

2. That said slaves, after they were taken off as aforesaid, were taken to the city of Paducah, where the appellee, being the owner of them, obtained and had possession and control of them, but failed to return them to appellant Johnson, or notify him

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that they were in his possession; and these facts are relied on as an abandonment of the contract by appellee, and a release of the appellants.

3. That by reason of the unlawful taking and removal of said slaves, the consideration of the covenant of the appellants entirely failed.

The appellee, having demurred to each paragraph of the answer, the demurrer was sustained, and the appellants failing to answer further, a judgment was rendered against them, from which they have appealed to this court.

If the appellants had not, by the express terms of the contract, taken on themselves the risk of losing the services of the slaves, the principle is well established and has been recognized in several recent cases, by this court, that the hirer of a slave for a particular term is not exonerated from his obligation to pay the price by the death, escape or abduction of the slave.

Conceding the facts as alleged in the answer, and the demurrer must be taken to admit them, we do not perceive that the first paragraph of the answer presents a bar to the action; or that the fact that the appellants were deprived of their property in the slaves by an act of robbery or unlawful spoliation, ought, in law or equity, to relieve them from a debt, in the creation of which their property in the slaves formed the consideration.

Nor can the facts disclosed in the second paragraph of the answer as presented be regarded as a sufficient defense. The alleged abandonment of the contract by the appellee and release of the appellants is but an inference from facts which, if true, could only be made available in defense of the action as the subject of a counter claim, and not as a simple defense to the action.

There is a manifest distinction between this case, as disclosed by the answer, and those in which this court has sustained the plea of no consideration to obligations for the price or hire of slaves. In this case it is not pretended that the slaves were unsound, or worthless, from any cause when the contract was executed, and they were delivered to Johnson. Having contracted for the use and control of them for a specific time, and received the possession of them, the property so acquired was as much at the appellant's risk as if the contract had been one of absolute purchase. But for another reason, the consideration did not fail. The hirer had a right, by virtue of the contract, to pursue and

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reclaim the slaves, or maintain an action for redress against the trespassers, or others guilty of harboring or withholding the slaves.

Upon the whole case, as disclosed by the answer, we are of the opinion that no sufficient defense was presented, and the demurrer to the answer was therefore properly sustained.

Wherefore, the judgment is affirmed, with damages.

CALDWELL, HUNTER & CO. v. WASHINGTON DAWSON.

Pleadings—Amended Petition—Limitation.

Limitation does not run against an amended petition which only supplies a defect in the original, as the original was not barred by time.

New Trial.

A new trial should be granted where the verdict greatly exceeds the amount justly receivable.

APPEAL FROM HARDIN CIRCUIT COURT.

June 14, 1867.

OPINION OF THE COURT BY JUDGE ROBERTSON:

The original petition on the written contracts embraced also the extra coal not stipulated for in them, and sought judgment for all the coal delivered. But, as that petition contained no allegation of a contract as to the surplus coal delivered and sued for, or of the value of it rendered an implied contract, this court decided that, on that petition as so framed, no judgment for more than 100,000 bushels covenanted for could be sustained. The subsequent amendment only supplied that defect, and thereby made the original petition good for all the coal which had been delivered. The original petition was the commencement of the action for all the coal, as well the surplus as the covenant coal, and, in no sense, was the filing of the amendment charging the value of the surplus coal the institution of a new suit. As time did not bar the original, it does not bar the amended petition.

There was therefore no error in striking from the answer the plea of limitation, which was contradicted by the record. But

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the Circuit Court erred in over-ruling the motion for a new trial on the ground that, according to any rational deduction from the testimony, the verdict was excessive.

Measured at the place of delivery, and by the standard prescribed by the former opinion of this court, the quantity of coal delivered beyond the written contracts could not, according to any allowable deduction, amount in value to half the amount of the verdict. And it is quite clear that, even if interest had been allowed by the jury, their verdict greatly exceeds the amount justly recoverable on any consistent hypothesis.

Wherefore, the judgment is reversed, and the cause remanded for a new trial.

JOHNSON MILLER *v.* R. S. GRAY ET AL; COLGATE & Co. *v.*
GRAY ET AL.

Assignment—Benefit of Creditor—Wife's Dower.

The wife is entitled to dower in the real estate of her husband assigned for the benefit of creditors.

Execution—No Property Found—Levied on Partnership Property—Suit to Enforce.

A creditor who has had an execution returned "no property found," may have another levied on the interest of his creditor in partnership property and may thereafter enforce his lien by a suit in equity.

Debtor's Right to Maintain Family.

It is a well settled principle that a creditor has no enforceable claim on the capacity or personal service of an insolvent debtor and the law will permit him to appropriate the products of his industry and skill to the maintenance of his family.

Same.

But as indulgent as the law is, it will not permit a debtor, after acquiring property by his skill, industry or credit, to secure to himself an estate by making his family the depository of the title for the purpose of defeating his creditors.

Insolvent Debtor Doing Business in His Wife's Name—System of Bankruptcy.

If an adventurer in trade may, on becoming insolvent, drop his own name and assume that of his wife as the head of a business and thereby become rich and yet defy his creditors, a more convenient system of

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bankruptcy could not be conceived, and such acts cannot be tolerated by the Courts.

November 27, 1867.

APPEAL FROM WOODFORD CIRCUIT COURT.

OPINION OF THE COURT BY JUDGE HARDIN :

On the 5th day of April, 1859, Robert S. Gray, being largely involved in debt, conveyed and assigned to Dudley R. Ball in trust for the benefit of his creditors his entire estate, consisting of a house and small tract of land, near the town of Versailles, four slaves, and some personal estate.

The liabilities of Gray, being found to exceed the value of his estate, the trustees brought a suit in equity, in the Woodford Circuit Court, for a settlement of his accounts, and a distribution of the assets, *pro rata*, among the creditors. In that suit, Mariah Gray, the wife of said R. S. Gray, and who was the sister of the trustee Ball, by an answer asserted her contingent right of dower, in the real estate conveyed to Ball by her husband, but consented that its value might be estimated and adjudged by the court to her separate use, which was done, and there was thus secured to her the sum of \$500.

The slaves lately owned by R. S. Gray, consisting of one man name Jim, a woman named Henrietta, and her two children, named Woodford and Susan, having been purchased by Joseph S. Woolfork, a relative of said Mariah Gray, said Woolfork by his deed dated, the 18th of April, 1859, conveyed the slaves to her, for her separate use for life, with remainder to her children.

At the date of said R. S. Gray's assignment, he appears to have been in possession of a tract of about 400 acres of land, near Versailles, in Woodford county, known as the "Ben P. Gray farm," which he had purchased, but on his becoming insolvent, without having paid for the land, his contract of purchase was rescinded. And said D. K. Ball, assuming to act as trustee for his sister, Mariah Gray, rented said farm for the year 1859, and hired slaves to cultivate it in addition to those conveyed to Mrs. Gray by Woolfork, with an arrangement with Gray and wife that said R. S. Gray should act as the agent of his wife, in the management and superintendence of the farm so as to be cultivated, and

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that the proceeds of the farming business should be first applied to the rent of the farm and hire of the slaves, after which, the net profits should belong to said Mariah Gray.

This arrangement was continued from year to year, and Ball rented the farm and hired slaves to labor upon it for 1860 and 1861. And, in the meantime, R. S. Gray bought supplies and stock, and sometimes hired labor, as agent, and in that capacity sold produce and paid rents and other expenses.

Ball appears to have rented one half of the Ben P. Gray farm, under the same arrangement for 1862, and one-fourth of it for 1863, and to have hired slaves as before. But in 1862, W. H. Rearden claimed to have purchased, in his own right, one-fourth part of the tract, and also to have purchased, conditionally, another fourth part, for R. S. Gray, and said Rearden and Gray became associated as partners in farming in 1862, and they cultivated in copartnership the half of the Ben P. Gray farm, rented by Ball, and the one-fourth, claimed to have been purchased by Rearden for Gray, as so much land furnished by Gray, and also the remaining fourth of that farm, owned by Rearden, and his own farm of 110 acres, and another tract rented by him, as furnished by him. This partnership was not sanctioned by Ball, and neither he nor Mrs. Gray seems to have been a party to it.

On the 28th of January, 1863, Rearden appears to have sold to Mrs. Gray his said farm of 110 acres, at the price of \$11,000, and on the 8th of June, 1863, he conveyed it to said Ball as trustee for Mrs. Gray, acknowledging in the deed the payment of \$1,000 of the purchase money.

Notwithstanding this transaction, Rearden and R. S. Gray appear to have carried on a large farming business as partners, again in 1863, without the sanction of Ball, or even that of Mrs. Gray, so far as appears in this record, the 110 acres purchased of Rearden, and so much of the B. P. Gray farm as was rented by Ball, being regarded as land furnished to the firm by Gray, while the interest of Rearden in the B. P. Gray farm, and other lands rented by Rearden, were furnished by him.

In August, 1863, the appellants, Johnson Miller and Samuel Colgate & Co., who were judgment creditors of R. S. Gray, and on whose judgment, which were rendered in 1859, executions had been issued, and returned "no property found," again sued out

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their executions, which were levied upon a quantity of hemp, wheat and barley, grown on the lands cultivated by Gray and Rearden, in partnership; the levy being intended to bind an undivided interest of Gray in the property.

These suits were brought by the appellants, against Gray and Rearden, to enforce the lien on Gray's interest in the property, claimed to have been acquired by the levy.

Gray having answered, denying that he had any interest in the property, and setting forth that the interest sought to be subjected belonged to his wife, or Ball, in trust for her separate use, amended petitions were filed, charging that her claim was false and fraudulent; that the tract of land held by Ball as trustee was purchased with Gray's money; that the conveyance of slaves to her by Woolfork was made in fraud of Gray's creditors, and that the property levied on, and all the means held and claimed as belonging to Mrs. Gray, were in fact Gray's property, and subject to his debts.

The answer of Gray and wife and Ball sufficiently controvert the averments of fraud, in the conveyance of the slaves and purchase of the land conveyed to Ball, as well as the charges that the property in controversy, belonged to Gray, but with other estate, claimed by Mrs. Gray, was so held and claimed in fraud of R. S. Gray's creditors.

The circuit court dismissed the petitions, adjudging the property to belong to Mrs. Gray, and Miller and Colgate & Co. have severally appealed to this court.

It is insisted for the appellees, and, we think, in accordance with principles and authority, that a creditor has no enforceable claim on the capacity or personal service of an insolvent debtor; and the law will permit the debtor in defiance of the claim of his creditors, to appropriate the products of his industry and skill to the comfortable maintenance of his family.

But indulgent as the law is, and should be, to those obligations, which naturally arise out of the domestic relations, it will not permit a debtor, after acquiring money or property, by his credit, or his industry, or skill, to secure to himself the use and enjoyment of an estate, by making his family the nominal depositaries of the title, merely to cover the property, and defeat the claims of creditors. (Doyle, &c. v Slaper, &c., 1 Dana, 538).

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We conceive the material inquiry in this case to be, not whether R. S. Gray's creditors could tax his capacity, or divert from his family, so much of his earnings as may have been reasonably necessary for their support, but whether the produce levied upon by the sheriff, or some interest in it, was his property, as the product of his personal skill and industry, or of his capital.

The theory of the defense is, that, although Gray may, by adding his immediate services, and previous earnings and acquisitions, to the use of property owned by his wife, and obtained by the credit and assistance of Ball, have contributed much to the production of the hemp, and barley, in controversy, inasmuch as in doing so, he acted as agent of his wife, and for the very purpose of assisting her to acquire an estate, which would be beyond the reach of his creditors, he had a right to do so in defiance of his creditors, although he thus accumulated a large estate in the name of his wife.

We cannot sanction a principle which seems to us so manifestly unjust.

If an adventurer in trade may, on becoming insolvent, doff his own name, and assume that of his wife, as the head of a business establishment, and under better auspices become rich, and yet defy the claims of those who have been the first to give him credit, a more convenient system of bankruptcy can scarcely be conceived.

As an incident to the right of a debtor to maintain his family from the proceeds of his labor or skill, it was held by this court in the case of *Robinson v Huffman & Wife*, 15 B. Monroe, 82, that the husband might make such repairs as necessary on the house of the wife, to make it habitable, without rendering such improvements liable to the claims of creditors, but the language of the opinion in that case is such as to restrict the husband's right to enhance the value of the wife's property to such improvements only, as were necessary to make the house comfortable as a dwelling for his family.

The principle decided in that case, and which have been recognized in *Doyle, &c. v Slaper, &c.*, *supra*, does not extend so far as to sustain the appellees in this case.

But it seems to us that whether the claim of Mrs. Gray to the land and slaves conveyed to her use by Rearden and Woolfolk is fraudulent or not, her claim, and interest in the hemp, wheat

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and barley in controversy, should be restricted to such proportion thereof, as is the product of the capital used as her estate, in producing it; that is, the fair rent of the land vested to her, and rented by Ball and the slaves, claimed by her and hired by Ball, and the use of any other capital which belonged to her, and that after excluding that and the interest of Rearden, in the property, levied upon, the appellants acquired a lien by the levy of their executions, on the residue, as the property of R. S. Gray, which may be enforced.

On the return of the cause, the court will by a commissioner ascertain the relative interest of the parties in said property, on the basis above indicated.

Wherefore, the judgment is reversed, and cause remanded for further proceedings consistent with this opinion.

Judge Robertson not concurring.

Lindsey, Porter, for appellants.

Hunt, Beck & Clark, for appellees.

R. D. CALLAHAN v. THOS. WALLACE ET AL.

Purchase Money Lien—Judgment Enjoined Does Not Destroy Lien—Surety on Injunction Bond—Subrogation.

Two judgments were rendered against one Caldwell for \$500 balance of purchase money lien due on land. His vendors, Wallace & Everett, owed a balance on the same land to their respective vendor, Moore, to liquidate which, the judgments against Caldwell were assigned to the said Moore. Thereupon Caldwell, in order to extinguish these prior liens by reason of said assignment, enjoined the judgments, seeking to sell the mill property. A judgment against Callahan as surety on the injunction bond of Caldwell was rendered. Held, that as these judgments against Caldwell were for purchase money and presumed to be a lien, upon the land, mill and house, the injunction did not destroy this lien, and if Callahan, the surety, was bound and compelled to pay the judgments, he, by subrogation, becomes entitled to this prior lien.

APPEAL FROM LAWRENCE CIRCUIT COURT.

September 14, 1867.

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OPINION OF THE COURT BY JUDGE WILLIAMS:

Wallace and Everet recovered two judgments of \$400 each against E. N. Caldwell, with a credit of \$324.98 on the first in the same suit, thus leaving really only about \$500 due on both, hence the description in the injunction bond of a judgment of \$500.

These judgments were for unpaid purchase price of a mill, lot and house which Wallace and Everett had purchased of Love, who had purchased of Moore.

A portion of the purchase price still remained unpaid to each vendor which had a lien upon the property; therefore to extinguish their liens Wallace and Everett assigned their judgment to their vendor Love, who assigned them to his vendor Moore. Caldwell to have the liens extinguished, enjoined the judgments, making all these vendors parties, which suit seems to have been consolidated with other suits pending for the purpose of having the property sold.

The property was sold, but how the proceeds were disposed of does not distinctly appear, but it is certain that Callahan, as surety for Caldwell, got but little or no benefit, even the small credit of \$28.23, which was allowed in the judgment in the consolidated cause was overlooked in the judgment against Callahan on the injunction bond.

As these judgments against Caldwell were for purchase money and presumed to be a lien upon the land, mill and house, the injunction did not destroy this lien, and if Callahan, the surety, has them to pay he, by subrogation, becomes entitled to this prior lien.

The obscurity and confusion of this record indicates that as the cause must be reversed because the credit for \$28.23 was overlooked; that on a return the parties should be permitted to amend their pleadings for the purpose of making the issues more distinct and intelligible and to show how and for what purpose the proceeds of the mill, house and lot had been disposed of and whether this had been done in derogation of the rights of the prior lien claimants, also the more perfectly to set out to whom these judgments against Caldwell should be paid, or who are the equitable owners thereof, and further to correct any mistake in the original judgments in the consolidated causes which the court in the judgment on the injunction bond suggests had been con-

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mitted. Both parties should be permitted within a reasonable time to so amend as to present distinct and intelligible issues calculated to reach the merits of the case.

Wherefore, the judgment is reversed, with directions for further proceedings, as herein indicated.

JACOB WISEMAN, *Appellant*; v A. J. RAINEY, *Appellee*.

Land—Suit—Tenant—Legal Title—Estate.

It does not appear that Rainey entered a sub-tenant under Wiseman, or knowing that his predecessor was Wiseman's tenant. Held, he was therefore not estopped to acquire the legal title.

December 10, 1867.

APPEAL FROM ESTILL CIRCUIT COURT.

OPINION OF THE COURT BY JUDGE ROBERTSON:

It does not judicially appear that Rainey entered as *in fact* a sub-tenant under Wiseman, or knowing that his predecessor was Wiseman's tenant; and therefore he was not estopped to acquire the legal title from Adams under whom Wiseman claimed a prior equity.

There being no proof of either fraud or mistake, the appellee's prior deed from Adams must, in this action, be adjudged to be the only legal title. And the appellant seems to have no legal right of entry on the appellee's possession.

Wherefore, the judgment is affirmed.

Turner, Appellant.

Barnes, Appellee.

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FOUNTAIN LACKERY v. SQUIRE LACKERY ET AL.

Execution—Validity of Judgment—Surrender of Property—Estate.

The execution of a replevin bond and the subsequent surrender of property to be sold under an execution issued on the replevin bond, operates to estop the party so doing and his vendee from claiming an interest in the land so surrendered.

Attorneys Fee—Defeated Party.

The appellant being defeated in the action, was liable for legal cost, but beyond that he ought not to be made to contribute to the payment of the fees of his adversary's counsel.

November 26, 1867.

APPEAL FROM LOISVILLE CHANCERY COURT.

OPINION OF THE COURT BY JUDGE HARDIN :

Jeremiah Lackery died in 1851. He owned several hundred acres of land in Jefferson county, part of which he devised specifically by his will to his children; and two hundred acres of which he directed to be sold by his Exors., and the proceeds to be equally divided amongst all his children—of whom and their descendants, evidently intended to be embraced by the devise, there were ten in number, viz.: Archibald K., Samuel, Alfred, Caroline, Levi, Squire, Fountain and John Lackery, and the children of William Lackery and Hanna Long, deceased.

The executors having failed to sell the two hundred acres, as directed by the will, a suit was brought in 1859, by Fountain Lackery, praying a division of the land, instead of a sale, and claiming, in addition to his own share, as a devisee, to own other interests, by purchase, and among them the share of Levi Lackery; and he exhibits a deed between himself and Levi Lackery, dated the 18th day of July, 1859, purporting to convey said Levi's interest to him.

Archibald K. Lackery, being at that time dead, his infant, and only children, George Lackery and Alfred Lackery, were made defendants, and, though it does not appear that they were served with process, a guardian *ad litem* was appointed for them, who filed an answer in which the claim of Fountain Lackery to the

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share of Levi is controverted, and it is claimed as having been purchased by Archibald K. Lackery at a sheriff's sale in 1853. It was the subject of further litigation in the chancery court, and now is the principal matter of controversy on this appeal.

The cause was heard in May, 1861, and the court adjudged the share of Levi Lackery, in controversy, to belong to Fountain Lackery, and directed a division of the land. In March, 1863, another suit was brought by Squire Lackery and others against Fountain Lackery and others, in which said children of A. K. Lackery were united as plaintiffs, seeking to vacate the judgment and other proceedings in the former suit, for the reason, among others, that said George and Alfred Lackery were not legally before the court in the other case by service of process or otherwise. In the petition in this action the claim of A. K. Lackery's heirs to the interest of Levi Lackery in the 200 acres of land is not specifically asserted; but the petition refers to and adopts as part thereof the papers, pleadings and record of the other suit, by which it mainly appears that said claim is based on the following facts:

On the 21st day of April, 1833, Levi Lackery executed his promissory note to Ira Westan for \$70, the price of a lot in the town of Cloverport, in Breckinridge county. In 1836 Westan brought a suit in chancery to enforce his lien on the lot, and Levi Lackery being then a non-resident of Kentucky, he was proceeded against constructively by warning order, publication and traverse, but was not otherwise before the court.

A *nisi* decree was rendered in July, 1837, and a final decree for a sale of the lot to satisfy the debt was rendered in October, 1837. Fifty dollars was realized by a sale of the lot. An execution is copied in the record dated the 1st day of May, 1838, directed to the sheriff of Breckinridge county, purporting to be issued upon a judgment against Lackery for said debt of \$70. It does not appear to have been delivered to any officer. A like execution was issued by the clerk of the Breckinridge circuit court, dated August 24, 1852, and credited by \$50 as made by the sale of said lot, and directed to the sheriff of Jefferson county, by whom it was received. And this execution was on the 8th day of November, 1852, replevied in the hands of the sheriff by Levi Lackery as principal and Fountain Lackery as his surety, the replevin bond being for \$75.43. Upon which bond an execution

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was issued against Levi and Fountain Lackery, which, in March, 1853, was levied on Levi Lackery's interest in the land, with his consent, as appears from the following writing:

"Louisville, Ky., March 1st, 1853.

"I give up to S. S. Hamilton, D. S., of Jefferson county, my individual interest in land and negroes belonging to my deceased father's estate as a levy to satisfy execution No. 1554, which issued from the Breckinridge circuit court in favor of Isaiah Westan. Levi Lackery."

Under the levy so made, the sheriff sold Levi Lackery's said interest in the land on the 11th of April, 1853, and A. K. Lackery became the purchaser for \$81.80, the amount of the execution.

In this cause the partition directed in the former suit was set aside and the land adjudged to be sold, and afterwards on exceptions filed by said George and Alfred Lackery to the report of a commissioner to ascertain the interests of the parties in the proceeds of the sale, said share and interest of Levi Lackery in the land or its proceeds was adjudged to belong to said heirs of A. K. Lackery. That judgment was subsequently set aside on the petition of Fountain Lackery for a rehearing, and afterwards re-entered as the final judgment of the court, from which Fountain Lackery prosecutes this appeal.

Whether the judgment in the Breckinridge circuit court was such as to authorize the issual of the execution thereon which was replevied by Levi Lackery and the appellant as his surety, we are of the opinion that the execution of the replevin bond and the subsequent surrender by Levi Lackery of his interest in the land, to be sold under the execution which was issued on the bond against him and the appellant, operated to estop both said Levi and the appellant as his vendee from asserting claim to the interest in the land so surrendered to and sold by the sheriff in opposition to the claim of A. K. Lackery or his heirs acquired by purchase at said sale, and it seems to us therefore that the chancellor properly adjudged the proceeds of said interst in the land to the children of A. K. Lackery, deceased. The objection that their claim is not so asserted in the petition as to authorize the judgment in their favor, being, as we think, untenable.

The judgment, which confirms the report of the commissioner of the several distributable shares in the proceeds of the land is

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complained of, by the appellant, because by the commissioner's report the sum of \$200 was deducted from the general fund for distribution and allowed as a fee to Messrs. Riley & Russell, the attorneys, for other parties than the appellant and in opposition to him. The appellant, being defeated in the action, was liable for legal costs, but beyond that he ought not to be made to contribute to the payment of the fees of his adversary's counsel, and to the extent that said allowance operates to diminish the share of the appellant in the fund to be distributed, the judgment is deemed erroneous, and for this reason must be reversed.

Wherefore, to the extent that the allowance to said attorneys affects the appellant's interest, the judgment is reversed, and the cause remanded for further proceedings in conformity with this opinion.

In all other respects, the judgment is affirmed.

Barr, for appellant.

Riley, for appellees.

L. MCQUARRY v. JOHN W. ROCHESTER ET AL.**Attachment—Necessary Affidavit.**

It is error to sustain an attachment levied on a non-resident's real estate in the absence of an affidavit to the effect that the defendant has no personal property in this State or not enough thereof to satisfy plaintiffs' claim.

Land Susceptible of Division.

It is error to adjudge that an entire tract of land be sold to satisfy a judgment when it is not made to appear that it was not reasonably susceptible of division.

APPEAL FROM GARRARD CIRCUIT COURT.

November 23, 1867.

OPINION OF THE COURT BY JUDGE HARDIN:

This appeal brings up for revision a judgment of the Garrard circuit court in several consolidated suits against Mrs. L. McQuarry and others, directing a sale of a house and lot in the town

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of Lancaster, levied on under attachments against Mrs. McQuarry, and a subsequent judgment confirming a commissioner's report of the sale.

The action of the court is complained of on various grounds, of which it is only necessary to refer to such as must control our decision. 1. In all the cases except that of L. Lusk the plaintiff failed to file an affidavit as required by section 251 of the Civil Code, to the effect that Mrs. McQuarry, who had not appeared or been actually summoned, had no personal property or not enough to satisfy the plaintiff's claims in this State known to them or the party making the affidavit. 2. As the price for which the property was sold exceeded the amount of the debts and costs, it was not necessary to adjudge the sale of the entire property unless it was made to appear that it was not reasonably susceptible of such a division as to admit of a sale of so much only as was necessary to pay the debts and costs, and as this fact was not made to appear, the judgment was on this ground erroneous. 3. In the cases of Rochester & McNeil, M. T. Evans, Yantis & Sweeney and Sutfield & Smith, the attorney, M. L. Rice, appointed to defend the action for the absent defendant, does not seem to have filed a written statement signed by him, of what he had done as required by section 441 of the Code before any order for his compensation should have been made; the orders allowing said Rice compensation in these cases was therefore erroneous.

Other irregularities appear in the record, but as the judgments must be reversed for the errors already indicated, it is unnecessary to consider them.

We express no opinion as to the validity of the sale. On the return of the cause, that matter may be litigated by proper proceedings, and the defendants will be permitted to defend the actions.

Wherefore, the judgments are reversed, and the causes remanded for further proceedings not inconsistent with this opinion.

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CAROLINE OTT v. JAMES H. OTT'S ADMINISTRATOR
AND CREDITORS.

Fraudulent Conveyance—Possession of Real Estate—Presumption of Ownership—Title Recorded—Badge of Fraud—Future Debts.

A deed acknowledged and lodged for record the day it bears date is constructive notice to the whole world, in whom the legal title is vested; the possession of real estate does not raise a presumption of ownership against the recorded title, nor is it ever a badge of fraud against the legal title as to future debts.

Same—Present Liabilities—Future Debts.

To successfully assail this deed it was essential to show that the conveyance was in actual fraud of his then existing liabilities or else intentionally so as to future creditors.

Judgment Reversed—Sale Set Aside.

When a judgment has been reversed a sale there under can not be set aside only upon equitable principles, or the defendant may elect to take the purchase price and the sale will be confirmed.

November 21, 1867.

APPEAL FROM LOUISVILLE CHANCERY COURT.

OPINION OF THE COURT BY JUDGE WILLIAMS:

February 9, 1859, James Ott, having purchased from John Kernan a house and lot in Louisville at four hundred dollars, caused it to be conveyed to his sister, the appellant.

The decedent was a sporting character, without family, and his sister a poor girl.

Deceased lived in the house with a woman as his mistress, until he died late in the year of 1861; his personal estate being insufficient to pay his debts, his administrator and his creditors seek to subject this property to sale for the purpose of paying his debts.

But one of the debts, and it amounting to only about \$75, existed at the date and recording of this deed, and his personal property was very ample to pay it, even if his means be disregarded, which is shown to have been several thousand dollars just before his death, and amply sufficient had his administrator obtained it to pay all his debts. As it is shown he had this money but a very few days before his death, and it not being shown that he

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had lost or otherwise disposed of it, the presumption is he had it at the time of his decease.

As the deed was acknowledged and lodged for record the day it bears date, it was constructive notice to the whole world in whom the legal title was vested; the possession of real estate does not raise a presumption of ownership against the recorded title, nor is it ever a badge of fraud against the legal title as to future debts.

To successfully assail this deed it was essential to show that the appropriation of four hundred dollars as a gift to his sister, which it is shown was the object of the decedent, was fraudulent actually as to his then existing liabilities, or else intentionally so as to future creditors. As he was then abundantly able to pay his only liability of about \$75, after making this gift, it was not fraudulent in fact.

The only evidence tending to show a fraudulent intent as to future creditors is the statement of the witness Pugh that decedent told him "that he had purchased the property in the name of his sister Caroline, that as he was a sporting man he wished to secure a house for his wife and family, and that he did not know what might happen."

If this be regarded as entirely competent and relative, which might well be questioned, it having occurred after the conveyance, still it only proves that in view that he might have a wife and family and might *lose* all his other means at sport, he wanted a part fixed so he could not *lose* it, not that he desired to keep it from anticipated bona fide legal creditors, and as debt made at sporting would not be legally binding if such was his intention, as to them this would not be fraudulent.

The facts proven do not establish either actual or presumed fraudulent intention, and therefore it was erroneous to subject said house and lot to sale at the instance of decedent's administrator or creditors.

The property was sold, but we now express no opinion as to the validity of the sale, as that can only be litigated between the purchaser and appellant upon proper proceedings, and then the sale can only be set aside upon equitable principles, but should she be willing to take the proceeds of the property these would be paid over to her by order of the chancellor.

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Wherefore, the judgment is reversed, with directions for further proceedings not inconsistent herewith.

Elliott, for appellant.

Hopkins, for appellee.

J. HEARTLEY & CO. v. JOHN BAIRD ET AL.

Assignment for Benefit of Creditors—Deed of Trust.

The deed of trust made by defendant to one Baird, as trustee, for the use of his creditors, vested them with rights which did not depend on the trustee executing bond and taking the oath prescribed by law.

Property Embraced in Deed.

The original stock and also such new stock as may have been purchased with its proceeds was protected by said deed of trust.

APPEAL FROM JEFFERSON CIRCUIT COURT. COMMON PLEAS.

December 19, 1867.

OPINION OF THE COURT BY JUDGE WILLIAMS:

The deed of trust made by Miller to Baird as trustee for the use of his creditors, made October 15, 1866, vested the creditors of Miller with rights which did not depend on the proper subsequent proceedings of the trustee, therefore, whether he executed the bond and took the oath as prescribed by the act of March 2, 1860, Myer Sup. 533, is not important further than to evidence a fraudulent combination. The larger portion of the creditors, both as to number and amount, having agreed that Miller should still conduct the business, no unfavorable inference is manifested by the trustee assenting to it.

Appellants could either resort to their pro rata claim as to these goods, or they could resort to the trustee's bond if one was executed, as they did not consent to Miller's still conducting the business, else they could resort to their judgment at law and levy on such property of Miller as is not purchased with its proceeds.

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Whilst such transactions are to be regarded with great jealousy, yet the evidence in this case exhibits no illegal purchase.

Wherefore, the judgment is affirmed.

Bruce & Russell, for Appellant.

Bijur & Thompson, for Appellee.

J. M. CRAWFORD v KIDD Et. Al.

Pleading—Jurisdiction of Circuit Court and Quarterly Courts of Amounts Less Than \$50.

A petition alleging an indebtedness of \$71 was filed in the Circuit Court, amount due on a promissory note alleged to have been lost and in the progress of the trial an amended petition was filed, stating that the note was entitled to a credit of \$35. Held, that the court did not err in sustaining a motion to dismiss the cause for want of jurisdiction, and in determining the question of jurisdiction the amended pleading should be regarded as qualifying and correcting the original petition, since the question of jurisdiction must be determined by the plaintiffs own assertion of his claim and not by the defense of his adversary.

APPEAL FROM MONTGOMERY CIRCUIT COURT.

January 31, 1868.

OPINION OF THE COURT BY JUDGE HARDIN:

The action of the circuit court in sustaining the motion of the appellee to dismiss the action for want of jurisdiction, presents the only question which we deem it necessary to determine on this appeal.

The original petition alleges that the defendants agreed to pay the plaintiffs \$71 by their promissory note, dated in 1854, which, being lost, cannot be filed, and in the progress of the cause, the plaintiff filed an amended petition stating that said note was entitled to a credit of \$35 paid in 1855. Thus according to the plaintiff's pleading as amended his claim, exclusive of interest, was clearly less than \$50.

Circuit courts have original jurisdictions of all civil actions ex-

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cept when exclusive jurisdiction is given to other courts (Civil Code, sec. 18). But by the 29th section of the Code, as amended in 1860, the courts of justice of the peace have jurisdiction, exclusive of the circuit court, but concurrent with the quarterly court of all actions for the recovery of money, or personal property, when the matter in controversy, exclusive of interest and costs, does not exceed fifty dollars in value.

It is apparent, therefore, that if the statements of the amended petition had been embraced in the original petition, together with those expressed in it, the cause of action thus disclosed would not have been one of which the circuit court had original jurisdiction, and it seems to us, that in determining the question of jurisdiction, the amended pleading should be regarded as qualifying and correcting the original petition, and thus defining the demand of the plaintiffs, as one over which the circuit court had no jurisdiction; and the fact that said payment of \$35 is alleged in the answer of the defendants does not alter the case, as the question of jurisdiction must be determined by the plaintiff's own assertion of his claim, and not by the defense of his adversary.

Wherefore, the judgment is affirmed.

Reid, for appellant.

Holt, for appellees.

GEORGE JENKINS ET AL V. ELIZABETH WEEKS ET AL.

Attorney and Client—Arbitration and Award—Right of Counsel to Submit Cause For Adjudication.

Although an attorney is not empowered by his general authority, as such to bind his client in a submission of his cause to arbitration, yet if he does so under special authority or where in doing so his action is ratified and adopted by his clients, the award, if otherwise valid, may be enforced.

APPEAL FROM CALDWELL CIRCUIT COURT.

January 16, 1868.

OPINION OF THE COURT BY JUDGE HARDIN :

Although an attorney at law is not empowered by his general

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authority as such to bind his client in a submission of his cause to arbitration, yet if he does so under special authority or as in this case his action in doing so is ratified and adopted by his employers, we perceive no sufficient reason why the award if otherwise valid may not be enforced.

It seems to us that if no submission to arbitration had been made, a court of equity might, appropriately have, on the facts disclosed, compelled Jenkins to account of the difference between the real value of the land and the inadequate price stipulated in the contract, at least to the extent of the price of that part of the land sold by him to Nichols. But whether upon the original pleadings and the evidence the court was authorized to adjudge a cancellation of the contract, or compensation in money to the plaintiffs, we do not doubt the power of the chancellor to accept and enforce the award of the arbitrators, as an equitable adjustment of the controversy when asked to do so by the plaintiffs, although they did not execute the agreement of submission, and, although by the death of J. W. Weeks pending the litigation, his rights were cast on his infant children by descent who, by a survivor of the action, became plaintiffs in his stead.

Wherefore, the judgment is affirmed.

Peepper, for appellant.

J. T. & A. MAGOWAN v M. R. EVERITT.**Contracts—Failure to Comply With Terms—Election—Rescission.**

When a vendee fails and refuses to comply with the terms of sale, the vendor may elect to treat the contract as rescinded or sue for the purchase price.

APPEAL FROM MONTGOMERY CIRCUIT COURT.

November 26, 1867.

OPINION OF THE COURT BY JUDGE HARDIN:

The appellee, M. R. Everett, brought this action against the appellants, John L. and James A. Magowan, who, with B. J.

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Peters, were executors of James P. Magowan, deceased, alleging that said executors about the 1st day of January, 1859, sold and delivered to J. F. Calk a slave named Edmund belonging to their testator's estate at the price of \$750, payable six months thereafter to be secured by note. That after the delivery of the slave to Calk he allowed him to return to his former home for his clothing, and thereupon the slave ran off and secreted himself, and shortly thereafter Calk sold his claim and chance of recovering the slave to the plaintiff for \$800, who paid him \$50 and agreed with him to assume his contract with Magowan's executors for the payment of said \$750; but that the executors refused to accept either the note of Calk or the plaintiff, according to contract, and the defendants by some arrangement with the slave regained possession of him without right, and after having the use of him for several months sold and converted him to their own use, and received for him \$1100 or \$1150; the petition prays judgment for \$1100 in damages.

The defense admits the sale of the slave to Calk, and that after formal delivery, the slave escaped from Calk, but the defendants allege that after the slave ran away Calk denied that he had been delivered to him, and refused to execute his note or otherwise comply with the terms of the sale, and thereupon the said executors elected to treat the contract as rescinded, and subsequently recovered possession of the slave, and sold him under their testator's will.

It was proved on the trial that the executors on the first convenient occasion after the sale requested Calk to comply with the terms of his purchase, by the execution of his note with security, and that he refused to do so, insisting that the slave had not been delivered to him.

And it was also proved that after Calk had refused to give his note, as aforesaid, and after the contract between him and the plaintiff the note of either Calk or Everett with sufficient surety, was offered to Peters, one of the executors, in compliance with the contract of sale, and that said Peters refused to accept said note for the reason that he did not consider that he was authorized to do so because the will of his testator required that two of the executors should concur in transacting such business.

The plaintiff recovered a verdict and judgment for \$850, subject to a credit of \$750; and the court, having overruled a motion

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of the defendants for a new trial, they have brought the case to this court.

The court should have given the 5th, 7th and 8th instructions asked by defendants, and this error was not corrected by the two instructions given by the court at its own instance. The right of the defendants to regard the contract of purchase as abandoned by Calk is in the first instruction made to depend on their then treating it as abandoned at the time they called on him to execute his note for the purchase price, but they were not restricted to that identical time, for they could elect either to sue him for the price bid, or to treat the contract as abandoned by him at any time after said refusal up to his tendering a compliance with the terms of the sale and purchase.

The second instruction by the court is not so specific as to the time defendants could regard the purchase as abandoned by Calk, yet it does not correct the error of the first and, connected with it, was well calculated to mislead the jury.

Wherefore, the judgment is reversed, with directions for a new trial and further proceedings as herein indicated.

Hazelrigg & Winn, Metcalfe, for appellants.

Turner, for appellee.

ISAIAH OFFUTT v JOSH B. KENNY.

Promissory Notes—Assignment—Notice—Set Off.

Where a promissory note has been assigned without the knowledge of the payee, he is entitled to a set off against the same to the amount he had paid the assignor before he knew of the assignment.

APPEAL FROM SCOTT CIRCUIT COURT.

November 25, 1867.

OPINION OF THE COURT BY JUDGE HARDIN:

The appellee executed his note to H. S. Glinn for \$2624.30 on the 11th of February, 1860, payable March 1, 1862, in part con-

sideration of a tract of land, and on the same day at Glinn's instance, he gave him another note for \$1500, which was credited on the first note; and Glinn about the same time assigned the note last given to B. C. Glass.

On the note for \$2624.30 are the following assignments: "Pay J. M. Glinn, H. S. Glinn." "Pay Isaiah Offutt, John M. Glinn."

The appellant Offutt, as assignee, brought this suit on the note, and the defendant filed an answer, setting up several claims as set offs, some of them being against H. E. Glinn and others against said J. M. Glinn.

The court sustained the plea of set off, so far as to allow the defendant credit by the following claims:

"1. A demand against H. S. Glinn for \$20.37½, with interest from October 1, 1860.

"2. A demand against said H. S. Glinn for \$125 for rent, with interest from the 1st of March, 1862.

"3. A demand against J. M. Glinn for \$200, with interest from the 1st of March, 1862."

The appellant complains of the judgment allowing these set-offs.

Whether Kenny held the two debts on H. S. Glinn after they were due, and before he had notice of the transfer of the note by H. S. Glinn, and whether he so held the debt on J. M. Glinn, without notice of his transfer of the note to the appellant, are the only questions to be determined.

The note of \$20.37½ was executed to Kenny September 10, 1860, and it appears that the claim for rent of \$125 was due to N. B. Kenny; and having been assigned to the appellee, Glinn promised to enter a credit for it on the note in 1860 or 1861, and the claim of \$200 against J. M. Glinn was for money paid to B. C. Glass for him, and was held by Kenny while J. M. Glinn held the note in controversy; as the testimony of Glinn himself conduces to show.

And, although H. S. Glinn and J. M. Glinn prove the assignments both to have been made within a short time after the date of the note, and before Kenny held the claims allowed as set-offs there are facts which conduce to a contrary conclusion. But, supposing it is true, that the assignment to J. M. Glinn was made at the date of the note, and that to the appellant was made a short time thereafter, and before its maturity, as stated by the Glinns,

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we think the weight of evidence is against the conclusion that Kenny had notice of the first assignment before his claims against H. S. Glinn were legal matters of set-offs in his hands, or that he was notified that the appellant held his note before he paid the \$200 to Glass for J. M. Glinn.

While the two Glinns testify that the first assignment was made in Kenny's presence, two other witnesses, Glass and Foree, who were present with Kenny, and had an equal opportunity with him of observing the fact, testify that they had no knowledge of such an assignment being made. Although J. M. Glinn proves a previous conversation tending to show that Kenny was informed in advance that such an assignment would be made, the presumption thus authorized, is repelled by the agreement between Kenny and H. S. Glinn that any loss Kenny might sustain by claims against the bond should thereafter be credited on the note, and by Glinn's subsequent agreement to credit the claim for rent on the note. And as to the assignment of J. M. Glinn to appellant, notwithstanding Glinn proves it was much before Kenny paid the \$200 for him to Glass he also proves that after that time he had the note in his possession, and without informing Kenny of the assignment, promised to credit the \$200 on the note. The fact that he may then only have had the note in possession as Offutt's agent, cannot alter the case, as it does not appear that Kenny knew that fact.

The facts that neither of the assignments was dated, although both the Glinns were then in failing circumstances, and no written notice of either assignment was given to Kenny, are also unfavorable to the state of the case represented by the Glinns; and it is worthy of observation, also, that they do not themselves expressly prove notice of either assignment, but only testify to facts conducing to show it inferentially.

The judgment is, we think, in conformity to the preponderance of the evidence, and it is therefore affirmed.

Polk & Cantrill, for appellant.

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H. C. HOWARD *v* M. MURPHY.**Pleadings—Answer—Offset—Counter Claim—Issue in Bar.**

The answer of the defendant was not an offset or counter-claim, but presented an issue in bar, which by the provisions of the Civil Code, stood denied except as conferred by the statements of the petition.

Contradictory Evidence—Peremptory Instruction.

Where there is a contrariety of evidence the jury should be permitted to find on it without a peremptory instruction.

APPEAL FROM MONTGOMERY CIRCUIT COURT.

July 1, 1867.

OPINION OF THE COURT BY JUDGE WILLIAMS:

The answer of defendant below was not an offset or counter-claim, but presented an issue in bar which by the provisions of the Civil Code stood denied except so far as confessed by the statements of the petition; therefore, it was not only unnecessary to reply, but no such pleading is known to the Code.

There was some contrariety of evidence; therefore, the jury should have been permitted to find on it without a peremptory instruction from the court to find for plaintiff.

It was erroneous to give the peremptory instruction as couched in the language of the first instruction, which was not cured by the following instruction, though they seem to be inconsistent.

As the judgment must be reversed for this error, it is unnecessary to say anything as to the discovery of the evidence after the trial.

Wherefore, the judgment is reversed, with directions for a new trial.

Holt, for appellant.

Tenney, for appellee.

JOSHUA TURNER v M. T. NEWMAN Et. Al.

Agency—Joint Owners of Contract—Notice of Payment.

A contract was entered into by three parties, owners of certain land, to sell to a fourth party, and only one of the owners conducted the negotiations, completed the sale, had the purchase price of the land payable to all jointly. A settlement of the interest on this obligation was made with only one of the owners when it became due, and a receipt given, signed in the name of all the joint owners. Held, that each payee must be regarded as the agent of the others, and the dealings with the one are the dealings with all.

Notice—Partition of Payments on Obligation to Joint Owners—Parties.

Where there is a covenant payable to several co-owners of an obligation, the obligor is not bound to partition the payments and see that each gets his part, nor if there should be controversies relative to it, is he bound without any notification whatever to have all present when he settles with either; in such cases, if any of the payees intend to withdraw the presumed agency from his co-owners, he might notify the obligor of such intention.

Same—Fraud—Collusion.

In the absence of allegation and proof in a petition to coerce payment of an obligation to co-owners, of fraud and collusion, and notice from all to the obligator, a settlement of the obligation with one of the co-owners will not be disturbed.

APPEAL FROM BOONE CIRCUIT COURT.

January 20, 1868.

OPINION OF THE COURT BY JUDGE WILLIAMS:

R. L. Newman was no party plaintiff, nor does he by any pleading ask a judgment or set out a cause of action against Turner, either jointly with T. Newman, or singly. He is made a party to Turner's cross petition, but does not answer it, and being served with process its allegations as to him should have been taken as true. The joint judgment in favor of M. T. & R. L. Newman for \$267.18 cost is not authorized by either pleading or evidence.

The case was previously before this court upon a sustained demurrer to the petition, and all this court then decided was that the petition itself, without the aid of the article of agreement as

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to the purchase and sale of the land, contained sufficient averments to show a cause of action, and therefore reversed the judgment. Upon the return of the cause Turner responded, set up the article of agreement, averred that the parties had previous to the suit settled and adjusted the whole matter in controversy and rescinded the contract, and asked that it be sustained, but, if not, then that the contract be rescinded for alleged causes. The court referred the matter to a commissioner, who reported that Turner should be charged \$275 annual rents, with interest thereon from the end of each year, and then for other items set out by him, making \$1283.65. His credits are then allowed \$1176.87, making a balance against Turner of \$106.76. The commissioner's report is made the basis of the judgment, save that the interest on the purchase price is made the criterion of the rents, and this being \$5700 credited with \$300 would make the annual rents \$324, instead of \$275, which, we think, would be the correct basis if the court should at all settle the rents, as this case is now presented. But this alteration would not justify the amount adjudged of \$267.18 costs, or two-thirds of the balance against Turner, as the whole would only be \$265.25. Clutterbuck, who held the article of agreement, states that in April, 1860, Turner and D. N. Newman came to his schoolhouse and stated that "he had agreed to settle or compromise their difficulties concerning the land," and requested him to make some calculations for them, which he did, and after he had made the calculations upon the data furnished by them, Turner then paid said Newman "*the balance of the interest due upon the purchase money,*" and this is corroborated by a receipt dated April 2, 1860, for seventy-two 83-100 dollars to Joshua Turner "*in full of all demands to date.*" Signed "Dan'l Newman & Brothers." Clutterbuck says Dan'l Newman and Turner then told him to destroy the article of agreement, as to the purchase of the land, but that M. T. Newman afterwards told him not to do so.

Dan'l Newman seems to have been the active agent in selling the land, at least the article of agreement is made in the joint names of D. N. Newman, R. L. Newman and M. L. Newman and signed by them, and the purchase price is payable jointly to them, whether they were joint tenants, or tenants in common, or coparceners, they held a joint and, we presume, an equal interest in

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the land, and when they sold instead of separating that interest they kept it up by an obligation to them jointly.

In this state of dealings each payee must be regarded as the agent for the others, and in all fair transactions, without notice from the other parties, the obligor should be protected in his transactions with either payee.

There were more than one legal reason why this contract should be rescinded, and Dan'l N. Newman violated no legal right nor proved that he colluded with Turner, or made an unfair settlement with him, but M. T. Newman goes on the naked legal principle that Dan'l N. Newman had no right to act as his agent for him, but surely where there is a covenant payable to several the obligor is not bound to partition the payments and see that each gets his part, nor if there should be controversies relative to it, is he bound without any notification whatever to have all present when he settles with either; in such cases if any of the payees intends to withdraw the presumed agency from his co-obligors he must notify the obligor of such intention. We think, therefore, in the absence of all allegation and proof that the settlement by D. N. Newman, with Turner, was collusive or unfair, and in the absence of any notification to Turner not to settle with him, the settlement should be upheld and the petition dismissed absolutely.

Wherefore, the judgment is reversed, with directions to dismiss the petition absolutely.

Pryor & Chambers, for appellant.

Carlisle & O'Hara, for appellees.

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HENRY HEIL v HERMAN ESSELMAN.**Contracts—Written—Unsigned—Evidence of Parol Agreement.**

A written contract, unsigned, may be referred to as containing the agreement between the parties with as much certainty, if not more, than the mere recollection of witnesses, and may be regarded as the establishment of a parol agreement.

Same—Extra Work—Price—Original Agreement.

So far as the work was done under the original agreement, it should be enforced and as far as there was an expressed agreement for alterations, this should be likewise enforced, and for such extra work as was not expressly agreed for, it should be allowed so far as its value can be estimated by the work embraced in the original contract.

LOUISVILLE CHANCERY.

November 22, 1867.

OPINION OF THE COURT BY JUDGE WILLIAMS:

It is apparent from the evidence that there was an express contract between these parties as to the price for which appellee was to build for appellant the house, and that the terms of this contract was reduced to writing by appellee and delivered to appellant, but which was not signed by him, notwithstanding which, it being proved to contain the stipulations of the contract, may be referred to as containing the agreement between the parties with as much certainty, if not more, than the mere recollection of witnesses and must at least be regarded as the establishment of a parol agreement. It also appears that afterwards the house was enlarged, for which appellant was to pay the additional sum of one hundred and fifty dollars.

It further appears that the brick wall was originally to be nine inches thick, and that appellant directed the brick workman to make it thirteen inches thick, and he would pay therefor.

According to the rules recognized by this court in *Western v Sharp*, 14 B. Mon., 178 and *Woodbury v Jones*, 11 B. Mon., 168, the original agreement, so far as work was done under it, should be enforced, and so far as there was an express agreement for alterations this should likewise be enforced, and for such extra

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work as was not expressly agreed for, it should be allowed for as not within the express contracts, but so far as its value can be estimated by the work embraced within the express contracts it should be so done, upon the presumption that both parties intended to be governed by such prices.

But as no specifications or bill of prices of the original building, as contemplated by the first plan, appears in the record it may be proper to allow for the increased thickness of the walls and such other extra work, not included in the enlargement of the house, as may have been done at customary prices at the time the work was done, unless appellant can show by evidence what were the prices of the different character of work it was originally undertaken at, in which case those prices should govern.

One hundred and fifty dollars for the enlargement of the house should be allowed as expressly agreed on by the parties, to be added to the original contract price of \$2375, subject to the credits as claimed by appellant and conceded by appellee.

It was proper to reject the receipt for \$1090, and in place thereof to allow a credit for \$190, as paid, the day it bears date.

As the chancellor erred in adopting a different criterion for appellee's compensation, in building the house, the judgment is reversed, with directions to ascertain the amount due him as herein indicated, this being the only error perceived in the judgment.

Muir & Bijuir, for appellant.

Pope, for appellee.

S. W. WALTERS Et. Al. v MOSES PRESTON.**Land—Vacant—Previous Entry—Inchoate Title—Subsequent Entry Void.**

Where a warrant for vacant and unappropriated land has been granted and an entry made in the surveyor's book describing same, the warrantee has an inchoate title, which is not destroyed by his neglect to carry it into grant, but on the contrary is protected from subsequent entry by statute.

Same—Legal Title.

Where a patent is not obtained within the time designated by law, the only legal consequence is that the legal title enures from the date of the patent instead of relating back to the date of the survey.

APPEAL FROM JOHNSON CIRCUIT COURT.

September 27, 1867.

OPINION OF THE COURT BY JUDGE WILLIAMS:

William M. Smithold, having obtained a land office warrant, assigned it to appellee, who caused it to be located and surveyed on 50 acres of land in Johnson county, January 7, 1835, but has never carried it into patent.

Appellants obtained a warrant and had it located and surveyed upon the land in contest August 14, 1861, and patented August 22, 1862. The question is as to these conflicting claims.

Chapter 102 of our Revised Statutes and the various amendatory acts, 2 Stant. Rev. Stat., 430, governs the case.

It authorizes the county court to grant warrants for vacant and unappropriated lands, on payment of such price as they may determine not less than five cents per acre, and then authorize the person obtaining the warrant to have the same entered in the surveyor's book, describing the same, it is also made the surveyor's duty to survey such entries in the order in which they may stand on his book.

Sub-division 8 of section 3 provides that none but vacant lands shall be subject to appropriation, and declares void every entry, survey or patent made or issued so far as it embraces land *previously entered, surveyed or patented*. Appellant had had the land both entered and surveyed, which were of record, and any person desiring to appropriate it had ample means of ascertaining the fact.

As was said by this court in *Fleppin v. Hays et. al.*, 3 Met., 215, appellee had an inchoate title which was not destroyed by his neglect to carry it into grant, but, on the contrary, was protected from subsequent entry by provision declaring after entry, survey or patent void.

If he did not get the patent within the time designated by law the only legal consequence would be his legal title enured to him only from the date of the patent instead of relating back to the date of the survey as he would have had he got it within the time designated by the statute.

The entry, survey and patent of appellants being absolutely

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void, so far as conflicting with appelle's survey, there is no valid reason for reversing the judgment, hence it is affirmed.

FANNY RAY ET AL V. DANIEL RAY'S ADMINISTRATOR ET AL.

Decedant's Estate—Memorandum Book—Evidence.

A memorandum book kept by the intestate as to advancements is competent evidence.

Parol Gift.

The memorandum, "I intend him to have the tract he lives on, which is to be surveyed and valued," establishes a parol gift of the land.

APPEAL FROM GARREARD CIRCUIT COURT.

December 16, 1867.

OPINION OF THE COURT BY JUDGE WILLIAMS:

If it was technically erroneous to adjudge a division of the estate of the intestate among his heirs without Zachary Ray's children being parties, they being minors and beneficiaries in the deed he made to the trustee for the use and benefit of his wife and children, to all his interest in and to his father's estate, although both Zachary and the trustee were parties, yet as these minor children and their mother were parties before the report of the commissioner dividing the estate was confirmed, and they took various exceptions to its confirmation and were heard before their exceptions were adjudicated, and as the adjudication was correct with the single exception of allowing two hundred dollars rent against Zachary Ray for the year 1864, we see no reason to disturb said judgment further than to correct this single item. The memorandum book kept by the intestate as to the advancements made to his children was both competent and credible evidence, and the court properly charged Zach Ray with the items so charged against him, the memorandum made in said book by intestate that "I intend him to have the tract of land he lives on, supposed to contain 100 acres, which is to be surveyed and valued, together with the continued occupancy of said land down to his father's death establish a parol gift of the land, the survey and

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valuation contemplated were merely to ascertain the quantity and what amount he should be charged therefor by way of advancements.

As the heirs might either confirm or repudiate this gift, he should not be charged with rents until some unequivocal notification that the gift would not be ratified, which, in this instance, was by the bringing of the suit January 9, 1865. As this two hundred dollars overcharge against Zach Ray and which affects his wife and children can be adjusted out of the personal assets, it will be unnecessary to disturb the division of the land. Judgment reversed.

Bradley, for appellants.

Dunlap & Anderson, for appellees.

JOHN L. CREECH v. JOHN E. SMITH.**Land—Parol Sale—Purchase Money Refunded.**

A party having sold, by parol, more land than was embraced in his deed and there being no memorandum by which his heirs could be charged, the purchase money having been paid, its value should have been ascertained and the amount deducted from the price of the land to which decedant had title.

APPEAL FROM HARLAN CIRCUIT COURT.

December 13, 1867.

OPINION OF THE COURT BY JUDGE WILLIAMS:

It is manifest from the proof that Henry J. Creech sold by parol, to appellant more land than is embraced in the deed of Penington to the latter, as said deed only includes the land sold Penington to H. J. Creech, the purchase money for which was paid by appellant to Penington as per agreement between H. J. and J. L. Creech.

H. J. Creech having died without executing any memorandum by which he or his heirs can be charged as to this land its value whatever it may be should be ascertained and deducted from the note sued on, unless appellee should establish by evidence the allegations of his response that he was induced to purchase said

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note by appellant; no such evidence now being in the case this allegation is unsustained.

As the record now stands the court erred in giving judgment for the remainder of the note deducting the credit and the judgment is reversed for further proceedings.

James, for Appellant.

Dishman, for Appellee.

HEZEKIAH PARK'S ADMR., v. SALLY PARK'S ADMR.**Decedents Estate—Disposition By Will.**

Though the testator contemplated an equal division of his estate among his two classes of devisees, yet, choosing as he did, the specific property to be distributed to each, the emancipation of the slaves allotted to one class did not entitle those devisees to any part of the property devised to the others.

APPEAL FROM ESTILL CIRCUIT COURT.

December 11, 1867.

OPINION OF THE COURT BY JUDGE ROBERTSON.

Through the testator certainly contemplated an equal division of his estate among his two classes of devisees yet, choosing, as he did, the specific property to be distributed to each subject to all contingencies, the emancipation of the slaves allotted to one class did not entitle those devisees to any portion of the land devised to the other class, any more than the death of the slaves after the termination of the estate of the devisee for life, would have entitled them to it. So far we concur with the circuit court.

We concur with that court also in the opinion that the personal property left at her death, by the legatee for life should be deemed her own absolutely, and which her administrator is entitled to hold for distribution among her legal distributees, or next of kin. The fact that he assumed the administration without objection implies an admission that it was hers, and fortifies the presumption arising from lapse of time and the perishable character of the property, that none of it was the specific property bequeathed to her for life.

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And, there being no proof on this subject, we cannot assume that any of it was not her own acquisition by labor or purchase.

As to the essential matters of litigation we therefore approve the judgment of the circuit court.

Nor is there, in our opinion, any such substantial error in the judgment for costs as to require a reversal on that ground. While there may be some slight deviation from technical right in the distribution of costs, it seems to us that nevertheless the judgment, as rendered approximates sufficiently, for substantial justice, an equitable distribution, all things properly considered.

Wherefore the judgment is affirmed, both on the original and cross-appeal.

Harlan, for Appellant.

JOSHUA DAVIS ET AL, v. WM. HIGGENBOTHOM ET AL.**Land—Conveyance Extorted—Held in Trust.**

The conveyance litigated in this suit was extorted from the father and mother by assurance that the land should be held in trust for all their heirs, subject to equal distribution among them at their death. Held, that a trust, both expressed and implied, is the plain and inevitable conclusion of reason and law.

APPEAL FROM GARRARD CIRCUIT COURT.

December 16, 1867.

OPINION OF THE COURT BY JUDGE ROBERTSON:

Considering the condition of the old father Emanuel Higgenbothom, the influence of his sons George and William who could mould him like clay in the hands of the potter, the gross inadequacy of the ostensible consideration, the strong probability that none of it was paid by George, and the extreme doubtfulness of any payment by William, and the facts and circumstances conducing to show a fraudulent purpose and sinister consummation by these two sons, and proving that the conveyances now litigated were finally extorted from their father and mother by assurances that the lands should be held in trust for all their heirs, subject to

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equal distribution among them at his death. Such a trust, both express and implied, is the plain and inevitable conclusion of reason and of law.

Consequently, as the appellants had no cause of action until the old man's death and a refusal to fulfill the trust, neither a statutory nor presumptive bar applies to this case.

Wherefore the judgment dismissing the petition against George and William is reversed and the cause remanded for further proceedings for distribution, by sale or otherwise, of the lands among all the heirs and an equitable adjustment of the rights of all parties.

But the judgment dismissing the petition against Davis is affirmed.

Bradley Dunlap, for Appellant.

Turner, for Appellee.

GEO. BURNSIDE, &c., v. JACOB ROBINSON, &c.

Contracts—Sale of Land—Suit to Enforce—Petition to Be Made Party—Statement of Facts.

In this suit for enforcing a contract for the sale of land appellants filed a petition to be made parties, alleging they were the "owners of the land and interested parties." No facts were stated showing the character of their claim, or how it was derived, whether from devise, contract or inheritance. Held, that each claim is too vague and indefinite for judicial review, and the cross petition was properly dismissed.

APPEAL FROM GARRARD CIRCUIT COURT.

December 13, 1867.

OPINION OF THE COURT BY JUDGE ROBERTSON:

In the progress of a suit in equity for enforcing a contract for sale of land between the parties to it the appellants, who were not parties to that pending suit filed a petition praying to be made parties on the simple allegation that they were owners of the property and interested in the case. They stated no *fact* tending to show the character of their claim, or how it was derived, whether

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from devise, contract, or inheritance. The court therefore having no clue for judicial cognizance of a claim so vague and undefined, and consequently unable to see that it was a proper subject of litigation in that suit, overruled the application and rendered a decree between the original parties. In thus refusing to permit such intervention and consequent delay and complication not apparently pertinent or available, the circuit court did no manifest wrong to the appellants who, not being parties, cannot be prejudiced by the decree as rendered between other parties.

If the appellants have any *prima facie* title, they may still assert it whenever they may choose to do so in a proper and tangible shape.

Judgment affirmed.

Bradley, for appellant.

Anderson, for appellee.

THE COMMONWEALTH v. JOHN GILL.

Criminal Law—Tippling House—License Transferred.

Garriot having obtained a license to retail spirituous liquors in a certain house and not choosing to exercise the privilege himself gave it to the appellee, who was indicted for retailing under that license. Held that the appellee had not violated the law against retailing spirituous liquor without a license.

APPEAL FROM TRIMBLE CIRCUIT COURT.

December 5, 1867.

OPINION OF THE COURT BY JUDGE ROBERTSON.

E. M. Garriot having obtained a license to keep a tavern, which authorized him to retail spirituous liquors and not choosing to exercise that privilege himself, gave it to the appellee John Gill, who, for retailing under that license, was indicted for keeping a tippling house.

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He pleaded the authority thus granted to him by Garriot under his license. And, on that issue, which the circuit court adjudged upon rendered judgment in his favor.

As the retailing was in a room covered by Garriot's license, it seems to this court that the judgment is right. Although Garriot testified that he had no interest in the profits and charged nothing for the privilege granted to the appellee, yet being, as he was, responsible on his bond for the conduct of the appellee as his gratuitous agent, the latter did not retail without lawful license and was therefore not fineable for the mere act of selling liquors by retail, nor was thereby guilty of keeping a tippling house. And this was substantially so adjudged by this court in the late unreported case of the Commonwealth vs. Neal.

Wherefore, the judgment is affirmed.

(See Vol. 1, Ky. Opin., 79.)

Attorney General, for appellant.

N. C. POWELL v. E. F. DAVIS' ADMR., ET AL.**Land—Processioners' Report—Prima Facie Evidence of Location.**

The report of survey and designation of boundary made in the presence of the appellant without objection to its accuracy and acquiesced in by him for many years is prima facie evidence against him and it was a continued admission of its accuracy.

Patent—Large Surplus.

A large surplus is not per se proof of a substantial deviation from the original survey.

Conversion Made in Former Suits.

The appellant in a suit with Griggs in 1838 alleged that Davis owned the land to a line even 26 poles higher up the river than that fixed by the Processioner. These records concessions are alone persuasive, if not conclusive, against the appellant.

November 25, 1867.

APPEAL FROM UNION CIRCUIT COURT.**OPINION OF THE COURT BY JUDGE ROBERTSON:**

The antiquity of the documentary evidence of the consecutive links of the derivative title under Chrougher's patent and the long

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possession according to that chain of title sufficiently authenticate those documents and cure any apparent error or defect in the formal authentication.

The report of the processioners in the year 1840 of a survey and designation of the boundary of Chrougher's patent made in the presence of the appellant Powell without any objection to its accuracy and apparently acquiesced in by him for many years is certainly *prima facie* evidence against him and also against his co-operating associate Wm. Brennan, and must therefore fix the boundaries unless shown to be erroneous. The circuit court adjudged that it stood unimpeached and decided this case according to the plat so established—and this court concurs in that judgment for the following several reasons:

1. The boundary fixed by the Report is essentially more consistent with all the facts in the Record and approximates more nearly to the courses, distances and shape of the original survey than any other which could be sustained.

2. The long acquiescence in it was a continued admission of its substantial accuracy.

3. The large surplus is not *per se* proof of substantial deviation from the original survey and, as Chroghan and Dark call for the same corner on the Ohio River, fixing Chroghan's lower corner on the river at the Burr Oak and extending Dark's river line so far as to leave no surplus in Chrougher's patent would give to Dark's much larger surplus than that of Chrougher's as designated by the processioners. Moreover, as the line back from the oak was marked not for Chroghan, but for another patentee, Webb, who does not call to adjoin him, and as the strongest evidence that the oak corresponds with Chrougher's lower corner on the river is a vague repetition which may have erroneously identified Webb's corner with Chrougher's, it is far more probable that the surplus results from extending Chroghan's river line too far down than too far up the river. And there is no rational ground for extending Dark further down than the processioners fixed him, which is 26 poles further than the call of his patent.

4. Powell, in a suit with Griggs brought in 1838, alleged that Davis, claiming under Chroghan, owned the land to a line even 26 poles higher up the river than that fixed by the processioners, and also in a suit against Spaulding on the same ground succeeded in both cases, and Powell and Hord's heirs owning the Dark survey,

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procured by "consent in 1857, a decretal partition allotting Powell's portion at the lower end of the survey on a line not as low down as that designated by the proccessioners.

These Record concessions as late as 1857, are alone persuasive, if not conclusive, against Powell.

Then, not only is there no evidence tending to show inaccuracy in the report of the proccessioners, but the facts conduce to fortify its conclusion. It is therefore conclusive proof in the case of the dividing line between Dark and Chroghan.

No title to any of the land in contest has been established by evidence of adverse possession for 20 years. The only pretence of possession for that period is by construction from partial occupancy outside of Chroghan's, and as that was under the junior patent to Powell's father, it was no possession actual or constructive, of any portion of the Chroghan land actually and constructively occupied under his title. The only entrusions within the Chroghan boundary were by a forcible extension of Powell's fence to a small extent on the land occupied by Delaney under Chroyan in the year 1853, and the like extension, in 1861, including a fraction of one acre of Brennan's land held under the same title.

The only hope therefore for the appellant is his claim to a division of the surplus between the patents of Dark and Chroghan on which he seemed chiefly to rely in argument. But this, if ordered, would be unavailing to Brenan, because the partition line would leave her on the Chroghan side—and it is equally inadmissible as to both Powell and Brenan, because, as before suggested, the surplus all lies in the lower end of Chroghan's survey; and consequently claimants under Dark can have no right to any of it, and are otherwise, as already shown, estopped from claiming it.

Wherefore, perceiving no error, the judgment of the circuit court is affirmed.

Yeaman, Hord, for appellant.

Heston & Taylor, for appellees.

ADAM YOUNG & REASON v. FRANK HENRY.

Bill of Sale—Lien Reserved—Unrecorded—Subsequent Mortgage—Actual Notice.

Although a bill of sale, in which a lien has been reserved has not been recorded, it is superior to the lien of a subsequent mortgagee who had actual notice of the unrecorded lien.

APPEAL FROM JEFFERSON (LOUISVILLE CHANCERY) COURT.

September 25, 1867.

OPINION OF THE COURT BY JUDGE ROBERTSON:

Through the lien reserved in the bill of sale was never recorded so as to give constructive notice of it to the subsequent mortgagee whose mortgage was recorded, yet he had, as the chancellor was bound to believe from the proof, actual notice which is much better. Consequently the decree preferring the unrecorded to the recorded lien was, in that respect, right and is affirmed.

But it seems to this court that so much of the decree as sustained the attachment is not sustained by the record. There is no evidence impeaching the mortgage as fraudulent or colorable; nor is there any evidence tending to prove a sale of or purpose to sell any property to postpone or embarrass any creditor. And the testimony of the only witness examined to prove the denied charge of a contemplated removal from the state failed to do so. His evidence cannot be consistently interpreted otherwise than as importing that Young, the common debtor, said, a few days *after the attachment of his goods, that*, unable to carry on his barber's shop, he thought he would remove to Memphis.

The judgment sustaining the attachment is therefore reversed, and the case remanded with instructions to dismiss the attachment. And as there is a partial affirmance and reversal, there will be no judgment for costs in this court.

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JOHN C. ELROD v. W. GEO. ANDERSON ET AL.

Parol Lease—Evidence to Sustain a Resulting Lien.

Although a moral sub-lease from the lessee of minors, for the indefinite term of their minority was void, it is still available for protecting the sub-lessee's possession as a resulting lien for improvements made by him with the sanction of the lessee and agent of the infants in face of an assurance by them that he might enjoy the possession during said infancy.

New Trial—Testimony of Absent Witnesses.

Where an affidavit of defendant for a continuance manifests due diligence in preparing for the defense, and shows that the testimony of his absent witnesses would be material for establishing his lien and the extent of it, a motion for a continuance should be sustained and where overruled, a new trial will be awarded by the appellate court.

APPEAL FROM JEFFERSON CIRCUIT COURT. COMMON PLEAS.

January 11, 1868.

OPINION OF THE COURT BY JUDGE ROBERTSON:

While the oral sub-lease to the appellant Elrod by Dupont the lessee of Anderson as agent of the infant owners for the indefinite term of their minority was not enforceable, still, being void, it is available for protecting the appellant's possession as a resulting lien for improvements (to an equitable extent) made by him with the sanction of both Anderson and Dupont in faith of an assurance that he might enjoy them during the said infancy.

The appellant's affidavit for a continuance manifests due diligence in preparing for his defense and shows that the testimony of his absent witnesses would be material for establishing his lien and the extent of it.

It seems to this court therefore that the court below erred in overruling the appellant's motion for a continuance.

Wherefore, the judgment is reversed and the cause remanded for further proceedings.

Brown, for appellant.

Bodley & Simrall, for appellees.

C. D. JACKSON & GILLISPIE v. THOMAS SHACKELFORD.

Lien—Venditioni Exponas—Writs Of—Evidence of Legal Levy.

When the appellants, in the court below, fail to produce or require the appellee to file all the executions which had been issued, the presumption of an execution lien arising from the undenied allegation and proof that writs Venditioni Exponas had been issued to sell the land, must be held to be sufficient evidence of a legal levy on it which operated as a lien.

Subrogation—Discharge of Lien of Creditors.

The payment to creditors of the amount of a lien on land, by advancements for the judgment debtor, entitles the person making such advances to subrogation to the lien of the creditors to the amount of the debts thus satisfied.

APPEAL FROM M'LEAN CIRCUIT COURT.

January 20, 1868.

OPINION OF THE COURT BY JUDGE ROBERTSON:

As writs of Ven. Ex. could not have been legally issued for selling Johnson's land unless it had been previously levied upon under fifa, the legal presumption, in the absence of any evidence to the contrary, must be that there had been such levy.

The appellants having failed to produce or require the appellee to file all the executions which had been issued, the presumption of an execution lien arising from the undenied allegation and proof that writs of Ven. Ex. had been issued to sell the land, must be held to be sufficient evidence of a legal levy on it which operated as a lien; and that lien is not shown to have been waived or lost. As the allegations and evidence sufficiently show that the appellee by advancing for Johnson about \$700, discharged, as sheriff, all the execution debts except a small remnant still unpaid on the executions of the appellant he is entitled to subrogation to the lien of the creditors whose debts he thus satisfied.

The land was sold for the appellant's legally subject to that lien; and, being sold for more than was due and for only a small portion of its value, the appellee, as substituted lien holder, had a right to have the sale set aside.

We perceive no essential error in the decree vacating the sale, nor in any other respect.

Wherefore, the judgment is affirmed.

Owen, for appellant.

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DAVID A. EDMONSON v. THOMAS SUMMERS.

Judgment By Default—Surety—Pleading.

In a suit for a *devastavit* the petition neither alleges the amount of assets nor its sufficiency to pay off the debts sued for, but leaves the amount blank and refers to the appraisement and sale bills to show its sufficiency. Neither of these documents were filed as exhibits. Held that a judgment by default against the surety, the only party served with a summons, was void.

APPEAL FROM MONTGOMERY CIRCUIT COURT.

January 10, 1888.

OPINION OF THE COURT BY JUDGE ROBERTSON:

In this suit for a *devastavit* the petition neither alleges the amount of assets nor its sufficiency to pay the debt sued for. The petition leaves the amount blank and refers to the appraisement and sale bills to show its sufficiency. But neither of these documents was filed. The judgment by default against the surety, who was the only party served with a summons, was unauthorized by the record as presented to this court. The judgment is therefore apparently erroneous.

Wherefore, the judgment is reversed and the cause remanded for further proceedings.

Reid, for appellant.

Hazelrigg & Winn, for appellee.

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MICHAEL WELLS v. ALEX. WILSON.

Champerty—Actions.

An action cannot be maintained in the name of one for the sole benefit of another under a champertous agreement.

APPEAL FROM ESTILL CIRCUIT COURT.

December 10, 1887.

OPINION OF THE COURT BY JUDGE ROBERTSON:

The uncontradicted testimony, as exhibited in this record, proves indisputably that this action is prosecuted in Wilson's name by Cox or Waters for his own sole benefit under a champertous agreement between Wilson and Cox against the letter and spirit of the 3rd section of the 12th Chapter of the Revised Statutes title Champerty, and consequently, there being no contrariety in the evidence on this subject, the verdict of the jury was without any evidence to support it and was moreover inconsistent with an extraction given by the court to the jury.

Wherefore, without noting any other alleged error, the judgment is reversed and the cause remanded for a new trial.

Turner & Lily, for appellant.

Barnes, for appellee.

W. P. NOLAND ET AL v. ANNA ELKINS.**Administrator De Bonis Non—Debt Due From Himself.**

Where an administrator de bonis non has acted improperly in not having an inventory of what came into his hands and thereby failing to preserve the evidence of the debt due by himself to his decedent, all reasonable presumption should be taken against him.

Interest.

It was error to compound interest against the administrator with biennial rests.

APPEAL FROM ESTILL CIRCUIT COURT.

December 12, 1887.

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OPINION OF THE COURT BY JUDGE WILLIAMS:

As it was the sworn duty of the appraisers and administrator of Zachariah Elkins, deceased, to report the personal estate on the appraisement bills, and they did report the note on Noland at four hundred dollars, this was competent evidence and *prima facie* established the amount of the debt, and which should prevail over the vague and uncertain recollections of witnesses in his behalf, he having become administrator *de bonis non*, and thereby become possessed of the evidence of the debt against him; had he acted properly he would have returned an inventory of what came to his hand, and preserved the evidence of the debts due his decedent from himself, not having done this, all reasonable presumptions should be taken the more strongly against him. It was, however, erroneous to compound the interest with biennial rests. The Statute, Section 25, Chapter 37, 1 Stant., 507, only makes the administrator liable for interest after two years, unless he negatives the presumption that he used the assets.

It was erroneous to adjudge to the widow the entire debt, as she was legally entitled to but a third, yet as the distributees were parties, this would have barred them from any future recovery, and, therefore, was no injurious error to appellant, yet as the judgment must be reversed, upon both the appeal and cross-appeal, for the first and second errors named, it would be well for the court in any subsequent judgment to correct this.

Wherefore the judgment is reversed upon the original and cross-appeals, without costs to either party, with directions to the court below for further proceedings as herein indicated.

Harlan, Barnes & Lily, for appellants.

Burnam, for appellee.

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THE CONNECTICUT BANK v. A. L. GREER ET AL.

Consolidated Cause—Agreed Order As To Proof Evidence.

A consent order was made in these consolidated cases in the following words: "It is agreed among the parties hereto, that the evidence now in the case, and that hereafter to be taken, may be read, and made to apply in each of these consolidated cases." Held, that by this order all the evidence taken in each and all the cases was before the court and should have been considered by the chancellor in each case.

APPEAL FROM KENTON CIRCUIT COURT.

September 17, 1867.

OPINION OF THE COURT BY JUDGE PETERS:

Appellant, a judgment creditor of A. L. Greer with an execution returned and endorsed by the proper officer "*No property*" instituted this action with attachment in the Kenton Circuit Court against A. L. and Thomas Greer to subject various parcels of real estate in the city of Covington specifically described in the petition to the satisfaction of its judgment, of which it alleges A. L. Greer is the owner; but that Thomas Greer claimed them under certain conveyances which A. L. Greer had made and called to be made to him with the fraudulent design to hinder and prevent the creditors of A. L. Greer, who was heavily indebted at the time, from collecting their debts, that the considerations recited were pretended, and unreal, and that Thomas Greer participated in said fraudulent design, and accepted the conveyance to carry out and perfect the fraud.

Other creditors of A. L. Greer brought their actions against him and Thomas Greer, and caused attachments to issue all of which together with that of appellant were levied on the property conveyed by the former to the latter, the actions were all consolidated to be heard together, and on final trial, the court below dismissed the petitions of appellant, of the Covington and Cincinnati Bridge Company and of Richard Ashcraft for the reason as stated in the opinion that there was no proof to sustain the issue presented in the pleadings, and adjudged to John W. Finnell, Commissioner of the Kentucky Trust Company, the sum of eight thousand eighty-seven dollars 95 cents with interest from the 1st of January, 1866,

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till paid and his costs, and a foreclosure of the equity of redemption of A. L. Greer and Thomas Greer in the property described in the mortgage to said Finnell filed as an exhibit, and a sale of so much as should be necessary to pay said debt. To Isaac Cooper the sum of two thousand five hundred and fifty-two dollars and 50 cents with interest from the 1st of January, 1866, till paid and his costs, and a sale of the property described in the mortgage filed by him as an exhibit, or so much thereof as should be necessary to pay the same. And that the attachments of L. C. and H. T. Pearce, and of Thomas Phillips be sustained and that they respectively have their liens on the property described in the mortgages to Finnell, and to Cooper, subject to said mortgages, and that so much of said property should be sold as would be required to pay said Pearce the sum of \$1,998.28-100 and interest from the 1st of January, 1866, till paid and costs, and Phillips the sum of \$5,606.31-100 with interest from January the 1st, 1866, until paid and costs the Pearces having the priority over Phillips, and if the property mortgaged to Finnell, and to Cooper should prove insufficient to pay their debts, and those of the Pearces, and Phillips, the deficit was to be made by a sale of the other attached property after paying to the Pearces the money which had been paid into court by some of the debtors of the Greers or one of them, and the master ordered to make the sale upon terms prescribed in the judgment. And so much of said judgment as dismissed the petition of the Connecticut Bank with costs is now complained of, and a reversal to that extent sought by this appeal.

As the indebtedness of Thomas Greer to the bank is not controverted in the answers, and is fully shown by copies of the judgment and execution filed as exhibits by appellant, the defect, or want of proof therefore suggested in the opinion must relate to the question of fraud and grounds for the attachment, and whether or not the conclusion of the court below as to these points was correct is the only question involved in this issue.

On the 18th day of April, 1862, a consent order was made in these consolidated cases in the following words: "It is agreed among the parties hereto, that the evidence now in the case, and that hereafter to be taken, may be read, and made to apply in each of these consolidated causes." By this order all the evidence taken in each and all of the cases consolidated was before the court on the trial of appellant's case, and if it authorized a judgment in

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favor of the Pearces, and Phillips, appellant's right to recover was precisely the same as theirs.

The whole of this very voluminous record has been carefully read, and without entering upon a discussion in detail, or an analysis of the evidence it must suffice that it satisfies us that the real estate attached by appellant should have been subjected to the satisfaction of its debt, or to the residue thereof after allowing all proper credits, to be postponed however, to the prior equities and liens of Finnell Commissioner, Cooper, the Pearces, and R. Phillips.

It will be proper to refer the case to the master to ascertain and report the true amount due appellant from A. L. Greer, and for that purpose it may be necessary to sell the bank stock, and all the stocks and collaterals placed with appellant by A. L. Greer.

Wherefore, the judgment so far as it dismissed appellant's petition is *reversed*, and the cause is remanded for a judgment and further proceedings consistent with this opinion.

E. M. QUIGLEY ET AL v. H. V. LOVING.

Wills, Construction of—Descent and Distribution—Reversionary Estate—Legacy.

A testator bequeaths to his several children certain legacies to be held in trust for their use and "in case of their death without children or heirs of their body, it shall revert back to the estate, etc." Held, that upon the death of one of said legatees, under age and childless, her pro rata as bequeathed, would fall back to the estate of the testator, and pass to his heirs and distributees, free from any trust whatever.

Same.

That part of the bequest to the deceased's inheritance which had no saving clause of reversion, would not reinvest in the estate of the testator, but would pass to the heirs and distributees of the deceased heir.

APPEAL FROM LOUISVILLE CHANCERY COURT.

January 8, 1868.

OPINION OF THE COURT BY JUDGE PETERS:

This action was brought to have the will of the late Thomas Quigley construed; and whether or not the chancellor properly construed the instrument, especially as to how the portion of the

estate bequeathed to *Eva*, daughter of testator, who died in infancy, and childless, passed, are the only questions presented in this record.

After, in the third clause of his will, giving to his three children, *Eva*, *Cora* and *Lucien*, \$10,000 each, the legacies to *Eva* and *Cora* to be held in trust for the use of the beneficiaries, the testator declares that the trust fund for his said daughters in case of their death without children, or heirs of their body, shall "*revert back*" to his estate, &c. From this language it seems clear that the testator intended that upon the death of either of said daughters, a contingency which has happened, the bequest to her would fall back to his estate and pass to his heirs and distributees, free from any trust whatever; it would therefore go to the brothers and sisters of *Eva*, and to the children of such as were dead, the children of a deceased brother or sister taking the share that their parent if living would have taken, and as it passed as a part of the estate of the testator, undisposed of after the lapse, it was a fund for distribution under the law, and the widow of the testator is entitled to her distributive share under the statute.

As to the beneficial interest in the estate of the testator which *Eva* took under the 4th clause of the will there is no provision that upon her death in infancy and childless it should revert back to the estate of the testator; consequently that interest upon her death passed by descent to *her heirs and distributees*, of whom under the statute of descents her mother is one; that part to be held by the trustee, and the profits thereof to be paid over as provided in said 4th clause of the will.

As to the one-ninth of the estate which passed under the 4th clause of the will to *E. P. Quigley*, as the whole is to be converted into personal estate, it must be regarded as personalty, and the widow of *E. P. Quigley* is entitled to one-third thereof, as the same may be realized, and made ready for distribution as provided for under said 4th clause; but as *Eva Quigley* died since *E. P. Quigley's* death, his widow can take no interest in the estate devised to *Eva*.

Wherefore, as the decree of the chancellor does not in all respects conform to this view of the case, the same is reversed, and the cause remanded with directions to render a decree in conformity to this opinion.

Bar, for appellants.

HUGH SPEARS ET AL. v. ROBERT A. SALE ET AL.

Wills—Antipathy Toward Children—Mental Delusion—Verdict—Judgment.

The antipathy which the deceased indulged toward his children, without cause, and out of which he could not be reasoned, indicates mental delusion, which resulted in the production of the document now sought to be established as his will and if this conclusion was more doubtful than it is, it might be made preponderant by the verdict of a jury of neighbors confirmed by a judgment of the circuit court.

APPEAL FROM WOODFORD CIRCUIT COURT.

November 25, 1867.

OPINION OF THE COURT BY JUDGE PETERS:

A writing purporting to be the last will and testament of Edmund Munday, deceased, was offered to the Woodford County Court for probate. And was rejected. The propounders then appealed to the circuit court, where upon the trial of the issue by a jury said document was found not to be the last will, and testament of said Munday, and a judgment having been rendered by the court in conformity to the verdict of the jury, and a new trial refused, the propounders have appealed to this court.

The contested paper was written and acknowledged in Versailles in April, 1866, to which place decedent had gone for the purpose of having it prepared, and publishing it; he was then about 66 years of age, had six children living, and a grand-daughter, the child of a deceased son, his wife was also living; he died in July following possessed, as is proved, of an estate valued at \$8,000, the most valuable part of which was his homestead, a farm of some 220 acres worth perhaps thirty dollars per acre. It does not appear that he had advanced any of his children, or his grand-child.

He had three daughters two of whom were married, the other a single woman of some 25 years of age or more as the evidence conduces to show, the grand-child about 4 years of age, the sons were all over 21 years of age; but whether married or not does not appear.

The provisions of the testamentary document are short and simple, in it decedent gives to his wife the one-third of all his

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estate for life and remainder to his daughter Mrs. Spear, and his two sons Robert and John. To his daughters Mrs. Sale and Mrs. S. E. Munday he gives \$200 each, to his son Reuben \$50. And to his grand-daughter Elizabeth N. Munday \$700 and the residue of his estate to Mrs. Spear and Robert and John Munday.

The two subscribing witnesses to the instrument, one of whom was the draftsman, and the other a brother of decedent, and both intelligent and respectable gentlemen, depose that at the time of its acknowledgement decedent was of sound mind and competent to make a rational and valid disposition of his property by will, and perhaps all the witnesses who testified in the case, except his wife, say he was competent to transact ordinary business, and to manage his own affairs with as much skill and judgment as men of common sense; but his wife proved that the last year of his life he managed his business badly, and spent about \$1,600 dollars foolishly.

To this evidence there are opposing facts which will be now noticed. For a number of years before his death decedent had been afflicted with disease of the kidneys, his disease had become chronic and continued to increase in violence until it terminated his life. From physical suffering and without hope of recovery he was melancholy and desponding and in temper as the disease progressed he became more impatient and irascible, especially towards his own children, and some of the witnesses prove that his malady and the imaginary disobedience and unfilial conduct of his children were his chief, if not constant themes of conversation. With them he had frequent difficulties, sometimes with one and then another in which his wife testified she thought his conduct was unreasonable, and sometimes irrational, often provoking them, never kind to them, and his aversion towards them increased as his health grew worse.

At one time he charged Sale, the husband of his daughter Lucy with having marked his hogs, invited those present to go with him to the lot where the hogs were to show by an examination of them that they were all found to be in his own mark, he left without saying any thing more. At another time he charged Sale with "*tutoring*" his sons Reuben and John (in the language of the witness) to dislike their father, for which there was as little foundation as there was for accusing him of marking his hogs. John was examined as a witness, and proves no such thing ever occurred, and although a favored beneficiary in the contested

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document, he says he is opposed to it, because he did not think his father could do justice amongst his children on account of his prejudices, he talked hard of them, was at sometimes prejudiced against all of them except his sister Susan (Mrs. Spear) and never at the same time friendly with all of them.

To his daughter Sarah he was very hostile, and although she approached him more than once to effect a reconciliation, the last time, only a few days before his death and while she was doing all she could for his comfort, but he turned from her relentless and died unreconciled to her, and her offense as explained by his wife was rather imaginary than real, and certainly did not merit the unforgiving antipathy manifested towards her by her father to the last. Other facts disclosed by the evidence might be referred to showing his displeasure towards others of his children at different times, but less violent and of shorter duration and generally accompanied with threats of disinheritance, though a recital of them is deemed unnecessary, it may not be improper however to mention the fact that he had previously published a paper as his will different in its provisions, and which he caused to be destroyed and had the contested paper prepared in its place, on account of a difficulty he had with his son Reuben shortly before its date.

The antipathy which the deceased indulged towards his children without cause, or if any existed, slight and trivial and out of which he could not be reasoned, indicates mental delusion, which the evidence conduces to show resulted in the production of the testamentary document now sought to be established as his will. But which cannot according to the weight of authority be done.

Redfield on the Law of Wills, pp. 72-3; 84-5-6-7. *Johnson vs. Moore's heirs*, 1 Litt., 370.

And as was said by this court in *Harrel, &c., vs. Harrell, &c.*, 1 Duv., 203, this conclusion were it more doubtful than it is, might be made preponderant by the verdict of a jury of neighbors confirmed by the judgment of the circuit court. And in this case by the judgment also of the county court.

Wherefore it is adjudged by this court that the writing in question is not the *Will* of Edmund Munday and the cause is remanded to the court below with instructions to enter this mandate and certify the same to the county court of Woodford with direction that the judgment of that court be affirmed. e

T. McCleod, Beck, for appellants.

Porter & Greathouse, Huston, for appellees.

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P. B. NUTTALL ET AL V. JAS. W. ROBERTS ET AL.

Appeals—Limitation—Judgment Presumed To Be Rendered On Last Day of Term—Extension of Term.

It may be presumed that a judgment was rendered on the last day of the term, where there is nothing to the contrary. The burden is on the appellant to show that the term fixed by law was extended.

APPEAL FROM HENRY CIRCUIT COURT.

January 12, 1867.

OPINION OF THE COURT BY JUDGE PETERS:

The plea of limitation is relied upon to bar this appeal.

The judgment appealed from was rendered at the September term, of 1863, of the Henry Circuit Court; but what day of the month, or of the term, is not stated in the transcript before us; the copy of the record was filed and the appeal was allowed the 15th of September, 1866.

The time for holding the Henry Circuit Courts was in 1863, as fixed by law, the first Monday in April, to continue 12 judicial days, and on the first Monday in September, and to continue six juridicial days. 1 *Vol. R. S.*, 317.

If then the September term of said court in 1863, commenced on the 7th day of the month, the latest day of the month that it could have commenced, and had continued the six days allowed by law, it must have adjourned on the 12th day of the month, and if it be admitted that the judgment was rendered on the last day of the term, the most favorable view for Nuttall, &c., it is apparent that more than three years had elapsed from the rendition of said judgment, before the appeal was taken, and it does not appear that the September term, 1863, of the Henry Circuit Court was extended beyond the six judicial days fixed by law. If the term was extended, it devolved on appellants to show it.

As therefore it does not appear that more than three years had elapsed next after the rendition of the judgment before the appeal was taken, the plea must prevail.

Wherefore, the appeal is barred.

Harlan & Harlan, for appellants.

Rodman, for appellees.

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NOLAND ET AL v. A. D. SHEPHERD.

Instructions.

It is error to instruct the jury that they ought to take as true all the allegations in the petition, not denied by the defendant in his answer.

Same.

By this instruction questions of law were submitted to the jury—whether a fact which alleged in any part of the pleadings be material or immaterial to the matter in issue, is a question of law for the court.

Deposition—Notice—Misnomer

A notice to take depositions was in the name of Greene, appellee, and in the caption, it stated that they are to be used in the case of Green assignee of Shepperd. Held, that it was not insufficient to authorize the court to exclude the depositions.

APPEAL FROM ESTILL CIRCUIT COURT.

December 10, 1867.

OPINION OF THE COURT BY JUDGE PETERS:

Although the weight of evidence inclines against the verdict, still the preponderance is not such as to authorize this court to interpose, and reverse the judgment on that account.

But instruction *No. 2* given at the instance of appellee cannot be sustained. It is as follows:

“That upon the trial of this case the jury ought to take as true all the allegations in plaintiff’s petition, and amended petition, not denied by defendant in his answer, except the question of the value of the property or amount of damages claimed.”

This instruction is substantially the same that was given in *Tipton vs. Triplett*, 1 Met., 571. Of which this court said. By this instruction questions of law were submitted to the jury instead of being decided by the court, as they should have been. Whether a fact which is alleged in any part of the pleadings be material, or immaterial to the matters in issue, is a question of law. And whether it has been denied in the answer, or the response, is also a question of law. The court should determine not only what allegations have been specifically controverted, and inform the jury

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what facts are to be considered by them as true under the pleadings in the action.

The instruction referred to was calculated to mislead the jury, and appellant might well complain of it as prejudicial to him, especially in a case like the present when the important fact to entitle the appellee to a recovery is left by the evidence, to say the least of it, in great doubt.

The notice to take the depositions of the Greens is in the name of appellee, and the caption states they are to be used in the case of *Green assignee of Shepherd*, that was not insufficient to authorize the court to exclude the depositions.

No other error is perceived in giving or refusing instructions. But for the error suggested, the judgment is reversed and the cause is remanded for a new trial and for further proceedings herewith.

Harlan, for appellants.

Barnes, for appellee.

SALEM W. WILEY v JAMES GATES.**Personal Property—Possession.**

The possession of personal property is *prima facie* evidence of ownership which would entitle the party so possessed to maintain an action against whoever may deprive him of his possession.

APPEAL FROM GARRARD CIRCUIT COURT.

December 17, 1867.

OPINION OF THE COURT BY JUDGE PETERS:

The possession of the mare by appellee was *prima facie* evidence of ownership and would entitle him to an action against whoever might deprive him of his possession, or detain her from him until a title superior to his own was shown.

Whether the government of the United States was the owner of the mare or not was not an issue involved in this suit, and was one which appellant could not make.

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No error is perceived in the instructions given at the instance of appellee nor in overruling those asked by appellant. Wherefore the judgment is affirmed.

Bradley, for appellant.

Anderson, for appellee.

A. J. JENNINGS v. WM. TURNER.

Land—Decretal Sale—Defective Title.

Before land is sold by a commissioner all liens and claims against it should be settled in the suit, in order that the purchaser may know what he is buying.

APPEAL FROM GARRARD CIRCUIT COURT.

December 16, 1867.

OPINION OF THE COURT BY JUDGE PETERS:

After the sale of about 235 acres of appellant's land. by the master under a judgment which appellee claims to have purchased, this motion was made by appellant to open the biddings, without tendering the money to the accepted bidder, or making any proof that any one was willing to pay more for the land, than the price bid by appellee, the motion was overruled, and appellant complains to this court.

If it only appeared that the land did not sell for a fair price without any extraneous facts operating to depress the price, and prevent competition in the bidding, this Court would not feel authorized to interfere; but on the trial of the motion, G. W. Dunlap, the commissioner who made the sale, was examined as a witness, and he proves when he put the land up, he proclaimed that he would sell it subject to the contingent rights of Mrs. Jennings to dower in it, that a suit was then pending in the Court of Appeals involving the title, and that Clayton Anderson also asserted a lien on the land. That he expressed the opinion that Mrs. Jennings' contingent right to dower existed, and he would sell the

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land subject thereto, and also to the final determination of the suit in the Court of Appeals, and to Anderson's claim to a lien, and the sale was so made.

It cannot be doubted that the certainty as to the character of the title which would pass by the sale from the statement of the Commissioner would deter those who might otherwise be disposed to purchase from bidding, prevent competition, and result in a sale to the more adventurous, who would only buy at a reduced price, leaving a margin to meet the alleged incumbrances, if they should be made available.

It is shown by the evidence that a Mr. Buford said he desired to purchase the land; but the title was not clear, it was still in litigation, and he would not buy a law suit, and for that reason would not attend the sale, and it furthermore appears that the price bid for the land by appellee, and at which he claims to be the purchaser, is inadequate and that it would have brought from \$3,000 to \$4,000 more if the title had been relieved of the clouds which were over it at the time of the sale, or was worth that much more than it brought. As the record now presents the title Mrs. Jennings has no contingent right to dower and the alleged lien of Anderson is not made out, these questions, or at all events the claim of Anderson, should have been settled, and the bidders at the Commissioner's sale informed in regard to the title which they would acquire by their purchase. This conforms to the formed adjudications of this Court.

The motion was made before the sale was confirmed, and will be regarded as a motion to set it aside, which it is in effect.

Wherefore the judgment is reversed and the cause remanded to set aside the sale and for further proceedings consistent herewith.

Bradley & McKee, for appellant.

Dunlap, for appellee.

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FOUNTAIN RICE v. R. H. JOHNSON ET AL.

Fraudulent Conveyance.

The husband being insolvent, bought a house and lot, and failing to pay for same, the wife's father paid the purchase money and had the conveyance made to her. Held, that there was neither actual or constructive fraud in the conveyance.

Improvement on Wife's Property.

The husband may put such improvements on his wife's property as will make it reasonably fit for occupancy by himself and family without such improvements being subject to his debts.

APPEAL FROM MADISON CIRCUIT COURT.

, December 7, 1867.

OPINION OF THE COURT BY JUDGE WILLIAMS:

Appellant at March term, 1862, of the Madison Circuit Court recovered a judgment for \$1,400, with interest from February 13, 1860, and costs, against Wm. Williams and R. H. Johnson. He sued out execution thereon in April and had it returned by the sheriff at his own order without levy, he subsequently had some five other executions and had the same return, when another execution was issued August 14, 1863, which was subsequently returned "no property found."

It is agreed that Johnson was Williams' surety in this debt, and it appears that something over eight hundred dollars have been made out of Williams.

March 8, 1860, R. L. Brady bought of W. J. Walker a lot and house in Richmond at \$1,500, to be paid January 1, 1864, and in the mean time to pay annual rents at the rate of \$150 per year.

January 1, 1861, R. H. Johnson bought this property of Brady and an endorsement is made on Walker's title bond signed by both Brady & Johnson stating that Johnson is to pay all the remainder of the rents and principal when due, and have all of Brady's right and title to the house and lot and possession by February 15, 1861.

Johnson paid to Walker the first rent, January 22, 1861, and May 18, 1862, paid the rent for 1862.

When Johnson married Miss Goodloe in 1856, he seems to have

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had but little, if any, property, her father gave her a house, two cows and household furniture suitable to their condition in life, also a slave woman as cook. Some two years thereafter he broke up housekeeping and sold his wife's furniture, house and one cow and hired out her cook at \$75 to \$80 per year, he then removed to his father-in-law's and remained there. Shortly before his purchase of the house and lot he had purchased a small stock of groceries, mainly on the credit of his brother-in-law, Barrett, at Louisville.

Mr. Johnson seemed urgent that he should get a house and go to house keeping, and they spoke of the Brady house, when he urged that he could not spare the money out of his business to purchase it, she then told him to use her money derived from the sale of furniture, &c., and hire of her cook. Soon thereafter he made the purchase, but failing to pay Walker, and he threatening to sue, she importuned her father to pay for the house for her. And in the spring of 1864, her father paid Walker \$250, and in September, 1865, paid him the remainder, \$1,370.97, with the understanding that the house and lot should be conveyed to Caperton as trustee for the separate use of Mrs. Johnson.

Walker was on the eve of starting to some of the Eastern cities when this last payment was made, and therefore did not execute the deed then.

The deed is dated October 24, 1865, and the petition is filed one day before, but the process was not executed until two days thereafter.

Plaintiff seeks to set this deed aside as fraudulent, and to subject the property to the payment of his debt, but if this cannot be done, he seeks then, a sale of the property to pay the advancements made by Mrs. Johnson's father and for the payment of his debt out of the surplus.

The *pro tem* judge to whom it was referred dismissed the petition and appellant seeks a reversal.

Johnson improved the property considerably whilst he was in possession, but Mrs. Johnson's father seems to have contributed largely to this, providing a horse at one time, and lending his own hands to labor, and furnishing materials and beside, she seems by her own meritorious labor, care and taste, to have largely contributed to its improvement, getting strawberries, fruit trees, &c., from her father and neighbors and adorning it with flowers, &c.

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It is insisted, however, that before this conveyance the property had risen largely in value and that this increase was his; against this it is urged that when her father first agreed to pay for it, for her use, that the war had not ended, and that its value had not then increased, because of the uncertain condition of the country, and that its increase has mainly been since the establishment of peace and the conveyance. And plaintiff's own conduct seems to fortify this, because he slumbered from 1862 to 1865 without filing any bill to subject this property, though he had had some six or more unavailing executions. And only filed the bill after he had been informed by Walker that Mrs. Johnson's father had paid the money and the property was to be conveyed for her use, and by arrangement between Walker and Rice its execution seems to have been delayed a few days to enable Rice to bring his suit, but though he brought suit before the conveyance was executed he seems to be cognizant of all the facts and understanding, because they are set out in his petition, therefore he had full and actual notice of Mrs. Johnson's equity, whatever it may be.

Looking at the whole case with the facts as presented, we are inclined to the opinion that there is neither actual nor constructive fraud in the conveyance.

Johnson seems to have vacated the stock, furniture and property given to his wife as her separate property, therefore his appropriation of it, by her consent, to the purchase of the house was not fraudulent, he seems to have had nothing from which the creditor could make his debt, previous to the purchase of the house, nor indeed afterwards, as may be inferred from his own conduct. As it was Johnson's duty to provide for his family and make them comfortable, the small contribution made by him in the improvement of the house and lot would not be fraudulent, but, especially, as the purchase money must be paid and the creditor had, or soon would, proceed by suit to subject it.

At the time Mrs. Johnson's father agreed to pay for the house and lot for her benefit, it does not seem to have had such an increase of value as to make the purchase either actually, or constructively, fraudulent, and there is an intrinsic probability that had the house and lot been subjected to the payment of Walker's debt, it would not have sold for more than the debt and costs.

The judgment is affirmed.

Turner, for appellant.

Burnam, for appellees.

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H. RUTHERFORD v. J. H. RICHART & GUDGELL ET AL.
 TAYLOR & TRUMBO v. RICHART & GUDGELL ET AL.
 L. GOODPASTOR v. RICHART & GUDGELL ET AL.
 J. J. LIGHTFOOT v. RICHART & GUDGELL ET AL.
 WM. RICHARDS v. RICHART & GUDGELL ET AL.

Attachment.—Non-residents—Want of Authority to Enter Appearance By Attorney—How Made Known.

It will not be judicially presumed that an attorney had no authority to enter an appearance for a defendant, but if he should do so without such an authority the whole judgment would be void; this can only be shown by a direct proceeding for that purpose.

Sureties—Judgment, For Before Paying Debt.

It was error to render judgment in favor of Rutherford's sureties before they had paid the debt.

Vendors' Lien—Answer Must Be Made a Cross-Petition.

Gudgell had obtained a judgment at law against Rutherford and filed an answer to the attachment suit asserting a vendor's lien, but he failed to make his answer a cross-petition against Rutherford, nor in any manner made him a party. Held, that the entry of Rutherford's appearance did not make him a party to Gudgell's answer.

Attachment—Levy—Priority of Liens.

When the sheriff levies attachments, first coming to his hands, on a reasonable amount of property, the levy of subsequent attachments on other property will give those a prior lien over the first attachments.

Judgment of Sale—Commissioners Deed—Lien For Purchase Money.

The judgment directing the sale did not reserve a lien for the purchase money; it was error to convey without reserving a lien. The purchaser being a party to the record, his purchase may be ordered to be cancelled. But where a purchaser is not a party his deed may be set aside by a special proceeding, but this will not effect his purchase.

Judgment in Favor of Sureties—Sureties' Right to Collect Debt.

A judgment against the principal in favor of the sureties on his bond, who had not paid the debt, should be for the payment of the amount of the holders of the unpaid debt; the sureties have no right to collect the money.

APPEAL FROM BATH CIRCUIT COURT.

July 2, 1867.

OPINION OF THE COURT BY JUDGE WILLIAMS:

Some thirteen creditors and sureties of H. Rutherford sued out attachments against him and had his lands, house and lot, and

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personalty, levied on and sold, on the allegation that he had voluntarily left the county of his residence and had for thirty days been within the military lines and in the military service of the "so-called Confederate States." Before the order of sale was made the record shows that his appearance was entered by J. M. Nesbit at the December term, 1863.

The sheriff sold the property levied on pursuant to said order and reported his sales at the following June term, 1864, which was confirmed and deeds ordered to be made and which were duly acknowledged and ordered to be recorded.

A receiver was also at the same time appointed and ordered to collect the sale money, pay to Gudgeon the amount of his lien claim on the house and lot, and the remainder, if any, of its proceeds to Richart, and reserved the rights of all the parties.

Rutherford, before this appeal was sued out, filed a petition to have these several judgments opened, reversed and set aside because he denied that Nesbit had any authority to enter his appearance, and alleging that he was prosecuting some of the attachments as the plaintiffs attorneys and in his own right together with other causes in said petition set out.

He also moved the court to quash the attachments and levies by virtue thereof.

And moved the court to quash and set aside the sales made by virtue of the judgment of court in said causes.

He also filed an answer and affidavit setting out that he had been proceeded against as a non-resident, and that Nesbit had no authority to enter his appearance, and asked to open the causes and be permitted to defend. All of these things were still pending and undetermined when he prosecuted this appeal, and all of which are made known to us by proper plea.

We cannot know judicially that the Nesbit who entered the appearance of Rutherford was the same Nesbit who had as attorney brought some of the attachment suits, and in whose name one suit was pending, and it is so contrary to the policy and purity of the law to permit attorneys to represent both sides, especially in a suit for his own benefit, that we will not presume the circuit court violated its duty in permitting its officers to do so.

Nor can we presume from this record that Nesbit had no authority to enter Rutherford's appearance, especially as none of the essential steps to authorize the sale of a defendant's property

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who was only constructively summoned to appear in this record. If Nesbit in fact entered Rutherford's appearance without authority, this would render the whole judgment fraudulent and void; but this can only be made known by a direct proceeding for that purpose, which Rutherford has instituted and is now prosecuting, and in which the court below on final hearing may correct all the various errors appearing in this record; for these reasons Rutherford's appeal must be dismissed without prejudice.

The judgment in favor of Rutherford's sureties who had not paid the debts should have been to pay the holders of the debts; therefore they were essential parties; the sureties had no right to collect the money, but as they prayed for judgment, and Rutherford's appearance being entered, we will leave this error to be adjusted on his pending proceedings.

Gudgell had obtained a judgment at law against Rutherford and he filed an answer to the attachment suits setting up and asserting a vendor's lien upon the house and lot levied on, and made his deed to Rutherford an exhibit, but he did not make this answer a cross petition against Rutherford, nor in any manner make him a party, therefore even the entry by Nesbit of Rutherford's appearance could not make him a party to Gudgell's answer.

Whilst Gudgell doubtless had a prior vendor's lien and perhaps could have proceeded by execution, on his judgment at law, to sell the house and lot, as Rutherford had become invested with the legal title to Gudgell's deed, yet the chancellor could only order a sale in his behalf upon proper proceedings, and an order of sale without either actual or constructive service, or entry of appearance of the defendant, would be an absolute nullity.

Richart's attachment was never levied upon this house and lot sold by Gudgell to Rutherford, and therefore he has no right to entervene between these subsequent attaching creditors who did have it levied on and its proceeds.

The sheriff's return shows it sold for about \$1,800. Rutherford gave greatly more than that for it. Gudgell's prior lien is only asserted for something over seven hundred dollars.

The sheriff made, doubtless, what he considered a reasonable levy on Richart attachment and the others which first came to his hands, without levying on this house and lot, and the levy thereon of the subsequent attachments gave those a prior lien over the first attachments which were not levied on it. The forcible taking of

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the slaves from the sheriff, by soldiers, at Rutherford's instance, if such was done as urged, could not affect the respective rights of the attaching creditors, nor disturb their priorities. The judgment directing the commissioner to make deeds to the purchasers does not reserve a lien for the unpaid purchase money; the deeds are not in this record; as but little, if any, of the purchase money was paid when these deeds were made, it was erroneous to convey without reserving a lien, and as the attaching creditors who may be entitled to the proceeds may have their claims endangered thereby, it is an error they have a right to have corrected. Goodpastor being a party to the record is affected by all its errors, and therefore his purchase and sale may be ordered to be cancelled without a special proceeding for that purpose, but Mills the purchaser of the house and lot seems not to have been a party to the record; therefore the sale to him can only be set aside upon proper proceedings for the purpose, but he was a party to the order directing a conveyance to him, and is affected by the error, and his deed should be set aside because no lien was reserved in the order directing it, but this will affect his purchase, it will stand as though no deed had been made.

Wherefore, the judgment allowing Gudgell and Richart a priority as to the proceeds of the house and lot is reversed on the several appeals of Taylor & Trumbo, Goodpastor, Lightfoot and Richards, with directions to permit Gudgell to amend his answer, make Rutherford a party thereto with a view to assert his prior vendor's lien,—should he do so within reasonable time, and to appropriate the remainder of its proceeds after paying Gudgell to those attaching creditors who first had it levied upon.

Goodpastor's purchase should be set aside and the land resold, and Mills' purchase should abide the future judgment of the court predicated upon the future proceedings and evidence which may appear on the trial proceedings instituted by Rutherford, which are now pending. Wherefore, Rutherford's appeal is dismissed without prejudice, and the order distributing the proceeds of the house and lot to Gudgell and Richart as prior claimants is reversed, also the orders directing a conveyance to Goodpastor and Mills, and for further proceedings as herein indicated.

R. Reid, Lacey, for appellants.

Gudgell, for appellees.

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THOMAS B. McELRATH ET AL v. JOSEPH McELRATH ET AL.

Gratuitous Services—Compensation.

One is not entitled to charge another for gratuitous services performed without expectation of pecuniary compensation.

APPEAL FROM MARSHALL CIRCUIT COURT.

January 18, 1868.

OPINION OF THE COURT BY JUDGE ROBERTSON:

If Joseph McElrath had, without objection, and in good faith, hired Polly out, he might have been responsible for only what he got. But he had no right to keep her in his own service and charge for the maintainance of herself and her infant children under eight years of age, for 12 years, \$1,375 or any other sum. Even as thus encumbered the inherent probability is that some other person would have paid something for her services, or would, at least, have kept her and her children for her services.

Without any proof of an effort thus to dispose of them in good faith the executor not only had no right to keep her and charge as he did, but he might be held responsible, if any loss resulted to the devisees from his voluntary assumption and apparent perversion of fiducial authority.

Nor do the facts exhibited in the record entitle him to \$1,375 or any other sum for attending to his mother for whom, after making generous provision for her by his will, the testator also provided that she should never want for anything needful for her comfort. This implied power in her to take or call for more than the use of the property devised to her, could not be executed by the executor without her express authority. And there is no evidence of any such need of authority. Joseph's occasional attentions to her and supervision of her affairs do not appear to have been more onerous or beneficial than filial affection and duty prompted and required. And consequently, there being no proof of any express contract, the law would not only imply any right or even intention to charge for those apparently gratuitous services and thereby tax

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the testator's estate with such extraneous charge. And that he did not perform those services with an expectation of pecuniary compensation or with a mercenary object, may also be inferred from the significant fact that, in four successive settlements with the county court, he had never charged anything for them or for keeping Polly and her children.

We feel constrained therefore to adjudge that the circuit court erred in allowing to the appellee Joseph McElrath, as it did, for keeping Polly and for services to his mother.

Wherefore, the judgment is reversed and the cause remanded for further proceedings.

Palmer, for appellant.

Gilbert, for appellee.

R. T. YOUNG & CORNELIUS v. H. H. WOODWARD.**Evidence—Principal and Agent—Competency of Agent as Witness.**

W. D. Dempsey was agent of Woodward to purchase tobacco for the market, and as such agent employed one Williams to make all purchases, which was done in the name of Dempsey, who took all obligations for delivery of the tobacco in the name of Dempsey. Afterwards, while Dempsey was still the agent of Woodward, and before the delivery of any of the tobacco or payment therefor, Dempsey told plaintiffs, who sold the tobacco, that all purchases were made for Woodward, that the tobacco would belong to Woodward who would make payment therefor. Held, that this evidence would be competent to establish who was the real purchaser and who was responsible therefor.

Same.

The contract for the purchase being in the name of Dempsey, agent of appellee, without disclosing his agency, or the name of his principal, would render Dempsey personally responsible, but could not exempt his principal from liability.

APPEAL FROM LOGAN CIRCUIT COURT.

June 26, 1868.

OPINION OF THE COURT BY JUDGE WILLIAMS:

It was established that W. D. Dempsey was the agent of appellee

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to purchase and put up tobacco for market, at Hundon near Valney's Depot in Logan county, and that he employed Williams to make purchases and that the latter in Dempsy's name purchased of appellants about 18,000 pounds and took appellants' written obligation to deliver at the place and time and for the price therein named, dated March 16, 1865, and that afterwards whilst Dempsy was still acting as the agent of appellee and before the delivering or time of delivery, in talking about said tobacco and its delivery and the payment therefor between appellants and Dempsy he told plaintiffs that the tobacco was purchased for appellee and it was his tobacco, and he would pay for it on delivery, all this evidence was competent, not only as establishing the sale but as to who was the real purchaser, and responsible therefor; the contract being in the name of Dempsy, who was appellees agent, without disclosing his agency or the name of his principal, might render Dempsy personally responsible but could not exempt his principal from responsibility.

The court erred in withdrawing this evidence from the jury, wherefore the judgment is reversed and the cause remanded for a new trial and further proceedings consistent herewith.

Underwood, for appellant.

THARP HUGHES v. MARY O'BANNON ET AL.

Construction of Will—Right of devisees to sell lands under a Special Legacy.

An action was brought against the vendee of several legatees charging the void sale of lands devised under the following clauses in the will of the intestate: After disposing of the lands in controversy, the sixth clause of the will reads, "Shrould the children think best to keep the proprty together and improve it to their mutual benefit in peace, law and harmony, I clothe them with full power and authority to do so; but in case of marriage, dissatisfaction or removal, they may consider each other's interest and divide, sell, deed and convey in such manner as to benefit them all and as seemeth to them best and most conducive to their happiness," and followed by a second clause reading, "Should any of my children die without a living heir of their body, then and in that case the property and proceeds which I have devised to them is to be revested in the last named children." Held, that sales of their respective interests by the devisees after they became twenty-one years of age, though they

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may have since died without issue, were authorized by the will, giving effect to the second clause and, as far as practicable, to render the different provisions of the will harmonious and consistent with each other.

APPEAL FROM GARRARD CIRCUIT COURT.

June 12; 1868.

OPINION OF THE COURT BY JUDGE HARDIN:

The correctness of the judgment of the circuit court seems to us to depend entirely on the solution of the question whether under the will of Daniel O'Bannon deceased, is devisees, whose interests are claimed by the appellant as a purchaser, were empowered on arriving of age to sell and convey their respective shares of the land notwithstanding the eighth clause of the will which provides as follows:

"Should any of my children die without a living heir or their body, then and in that case, the property and proceeds which I have devised to them is to be revested in the last named children."

It is a rule in the construction of wills, too well established to require the citation of authority, that effect should be given to every part of a will if possible, in order to carry out the intentions of the testator, which are to be collected from the entire instrument.

The testator after disposing of his lands, embracing the interests now in controversy, provided in the 6th clause of his will as follows:

"Should the children think best to keep the property together, and improve it to their mutual benefit in peace, law and harmony, I clothe them with full power and authority to do so; but in case of marriage, dissatisfaction, or removal, they may consider each others interest and divide, sell, deed and convey in such manner as to benefit them all and as seemeth to them best and most conducive to their happiness."

To give effect to the above clause and as far as practicable to render the different provisions of the will harmonious and consistent with each other, we are of the opinion that although the devisees under whose sales and conveyances made by them were

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authorized by the will and the appellant's title acquired thereby is valid.

The testator appears to have had nine children living at the date of his will, two of whom are excluded by the will, in which after making provision for his wife the testator seems to have intended an equal division of his estate among his other grown children, except that Tabitha Hughes, wife of the appellant and Elijah O'Bannon, the father of the appellees, having each received \$800 of his estate, they are charged therewith, and to equalize the other five children with them, the tract of 167 acres of land is devised to James, Daniel and Yelerton O'Bannon in the third clause of the will, and by the fourth and fifth clauses thereof, he gave to his daughters Katherine and Virginia each property in slaves of the value of \$800. Thus was left for ultimate division among said remainder of the 167 acres of land (67 acres thereof having been sold by the testator in his life time), unless it be from James O'Bannon, who it is alleged is dead, but on the return of the cause seven devisees the residue of his estate, including the 140 acres of land devised to his wife for life, which, as it remained unsold at her death, is directed by the seventh clause of the will to go equally to them.

It seems to us that the appellees are entitled to no interest in the the court will ascertain the extent of their interest, if any, in that tract and also in the tract of 140 acres according to the principles this opinion and as to those matters as well as the claims of the appellees as distributees of Mary O'Bannon and the set-off thereto pleaded by the appellant, further preparation and final adjustment may be made.

Wherefore, the judgment is reversed on the original appeal and affirmed on the cross appeal and the cause remanded for further proceedings not inconsistent with this opinion.

Durham, Jacobs, Owsley & Burdell, for appellant.

Anderson. for appellees.

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WM. WHITE ET AL v. B. DAWBURG ET AL.

Jurisdiction—Dissolving of an Injunction Without Final Judgment—Appeal and Error.

The Court of Appeals' jurisdiction extends only to the final orders and judgments of inferior courts and cannot assume jurisdiction of an order dissolving an injunction without a final judgment in the action.

APPEAL FROM CAMPBELL CIRCUIT COURT.

June 23, 1868.

OPINION OF THE COURT BY JUDGE HARDIN:

This is an appeal from an order dissolving an injunction without any final judgment in the action, and as the jurisdiction of this Court extends only to the *final* orders and judgment of the inferior courts, the order from which this appeal is prosecuted is not deemed such as to authorize an appeal to this Court. (Civil Code, sections 15-574. Rodman vs. Forlim, 2 Metcalf, 325.)

The appeal is therefore dismissed for want of jurisdiction.

Fearon & Hawkins, for appellants.

Craddock, for appellees.

A. J. PAYNE v. JAMES HOUK, ADMR., ET AL.

Bond For Title For Conveyance of Land to Defraud Creditors—Equity.

A court of equity will not enforce a conveyance of land under a bond for title given by the intestate for the purpose of defrauding creditors, even though the creditors of the intestate did not join in the bill to set aside the contract bond.

Pleadings—Jurisdiction of Courts Over Property not in Controversy.

The Circuit Court has no right to assume jurisdiction over land not embraced in the petition, nor the appointing of a commission to ascertain the rents, profits, etc., due from a defendant in possession, until an amended pleading shall have been filed charging the defendant with the use and occupation of the land.

APPEAL FROM ROCKCASTLE CIRCUIT COURT.

June 9, 1868.

Opinion of the Court.

OPINION OF THE COURT BY JUDGE PETERS:

This action was brought by Houk, administrator of Moses Payne, deceased, to enforce the collection of two notes of fifty dollars each, executed by A. J. Payne to the intestate, in part consideration of a portion of his homestead tract of land, as is alleged contracted to be sold by said intestate to said A. J. Payne, who in his answer admits he owes the amount of the notes, subject to a credit for \$16.91, endorsed on one of them; but insists that they were executed in part consideration for the whole of the tract of land owned by intestate at the time, and not for a part thereof, alleges that his contract as he claims it, is evidenced by the title bond of intestate, which he files with his answer, and for which land he contracted to pay two hundred dollars in four equal, annual instalments, two of which he had paid, and the two for which the two notes sued on were executed, were unpaid, and made his answer a cross-petition against the administrator, heirs and widow of said intestate, and prayed that they should be compelled to convey the whole tract to him, which the administrator and a majority of the numerous heirs resisted, allegeing that the bond filed by appellant was executed for the fraudulent purpose on the part of intestate, and A. J. Payne, of covering up the property of the former, to avoid the payment of the debts of said intestate.

On the trial, the court below refused to execute the contract set up by A. J. Payne, and dismissed the cross-petition, rendered judgment against him for the amount due on the two notes sued on, less \$16.91 endorsed on one of them as a credit, and subjected to the payment thereof the part of the land alleged in the original petition to have been contracted to be conveyed by intestate to A. J. Payne; from that judgment he has appealed, and insists that the court below erred in not adjudging to him the whole tract, subjecting a sufficiency thereof to pay the unpaid price, and ordering a conveyance to be made to him of the residue.

The bond for a conveyance of the entire tract of land, filed by appellant, was made with the fraudulent design of hindering and preventing the creditors of Moses Payne from subjecting his property to the payment of his debts, as is certainly and incontrovertibly established by the evidence, and courts of equity will not aid parties to such contracts in any way, but will leave them in the condition they are found. Appellant's cross-petition was

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therefore properly dismissed, nor was there any error to his prejudice in the judgment subjecting the land for a part of the price of which the notes were executed to their payment. Wherefore, the judgment of date the 7th of March, 1866, is affirmed.

But, at the August term, 1866, the circuit court after directing his master to go on the land sold by intestate to appellant, and lay off the same by metes and bounds, and to convey it to the purchaser, directs him to take possession of the residue of the tract, ascertain who had been cultivating the same since the death of Moses Payne, the value of the rents, waste, and damages, if any, committed, who by, and report to the next term of the court.

The master executed said order of reference, and reported appellant had been in possession of the greater part of the land since the death of intestate, ascertained and reported the value of rents, &c., and presented the same in three aspects, one of which shows appellant indebted to the estate, after allowing for repairs, &c., \$53.70, to all of which he excepted, but his exceptions were overruled, and at the March term, 1867, judgment was rendered against him for \$53.70, with interest from the 6th of March, 1867, till paid, and the costs of said proceedings, and of that judgment appellant complains.

No amended pleadings were filed by the administrator of intestate, or any of the parties interested, against appellant, charging him with the use and occupation of the land, while in the original petition, and subsequent amendments, the only relief sought was the recovery of the debts evidenced by the two notes sued on. Appellant had no opportunity of contesting the claim for rents, and damages for waste, or of defending himself from liability therefor, but without allegations of an indebtedness on that account the court of its own volition directs an inquiry by his master into those matters, and upon his report renders judgment against appellant, and assigns the widow dower in the estate. If appellees had a claim against appellant for rent of the land, and waste committed, they should, at least, by an amended pleading, have asserted their claim, and afforded him the opportunity of controverting the same before a judgment could be properly rendered against him for anything on the account.

Wherefore, the judgment of the 8th of March, 1867, for the sum of \$53.70 with interest and costs against appellant is reversed, and the cause remanded with directions to permit the parties to

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amend their pleadings, if they should desire so to do, within reasonable time, and for further proceedings consistent with this opinion—as one judgment appealed from is reversed, and the other affirmed, each party will pay their own costs in this court.

Carter, for appellant.

JOHN E. RICE v. WASH. DENTLY.

Witnesses—Restrictions to Number Allowed to Testify—Indemnity of Property.

Before the introduction of testimony in the case at bar, the court announced in substance that the number of witnesses on each side as to the identity of the animal in dispute would be restricted to three. The plaintiff, after examining several other witnesses, offered to prove by one Wells, and others, facts conducing to identify the mare in controversy as one which he owned and had in November 1863, but on objection of defendant, the court refused to permit the witness to testify. Held, that the court was not authorized to restrain the examination of the witnesses, as the identity of the property in controversy may be determined from various facts and circumstances, some of which might be proven by one witness and some by another.

APPEAL FROM BATH CIRCUIT COURT.

July 2, 1867.

OPINION OF THE COURT BY JUDGE HARDIN:

Before the introduction of testimony in this case the court announced in substance that the number of witnesses on each side as to the identity of the animal in dispute would be restricted to three, and in the progress of the trial, the plaintiff after examining certain other witnesses as to facts conducing to identify the mare in controversy as one which he owned and had in November, 1863, but on the objection of the defendant the court refused to permit the witnesses to be examined. This ruling of the court was erroneous, according to the opinion of this Court in the case of *Kach vs. Richust* decided in 1866, in which it was held that as the identity of the thing in controversy may be determined from various facts and circumstances some of which might be proved by one witness

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and some by another, it was erroneous to restrict the number of witnesses proving facts so tending to identify the property to three on each side.

The court was not authorized to do so in this case, either by its general discretionary power to restrain the examination of witnesses within reasonable limits, nor by the existing statutory restrictions as to the taxation of costs.

Wherefore, the judgment is reversed and the cause remanded for a new trial and for further proceedings not inconsistent with this opinion.

Gudgell, for appellant.

WM. P. LYNCH v. TOBIAS REYNOLDS

Misjoinder of Causes—Pleading—Non-Suit.

Though two distinct causes of action are shown by a petition, one on contract and another on tort, such a misjoinder cannot be taken advantage of by objection thereto in the answer of defendant. To be available as an objection, motion to strike out either contract or tort must be made, and this being the statutory mode for excepting to the misjoinder, which, having been waived by non-exception in the prescribed mode, would be no ground for non-suit ordered by the court.

APPEAL FROM ESTILL CIRCUIT COURT.

December 10, 1867.

OPINION OF THE COURT BY JUDGE ROBERTSON:

The judicial presumption from the record as now presented to this court is that the county court had no jurisdiction to order the sale of the appellant's corn; and consequently, the sale was apparently void and the appellee's conversion actionable as a tort.

And, though the 3rd paragraph in the appellee's petition is on contract not formally conjunctionable with the 1st and 2nd on tort, yet this testimonial misjoinder could not be aken advantage of availably by objecting to it, as the appellee did, only in his answer. Motion to elect or strike out either tort or contract was the only statutory mode of excepting to the misjoinder which, having been

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waived by non-exception in the prescribed mode was no ground for the non-suit ordered by the court.

The petition and testimony seem to show a good cause of action for damages to some material extent; and therefore the peremptory instruction to find for the appellee was erroneous.

Wherefore, the judgment is reversed and the cause remanded for a new trial.

Turner, for appellant.

Barnes, for Appellee.

J. H. LINDENBERGER ET AL v. DAVID HURLBURT ET AL. . .

Leases—Lodged for Record—Constructive Notice.

Where a lease has been lodged for record, in the proper office, and the taxes paid, it will, for the purposes of constructive notice, be treated as recorded.

Fraud and Forgery—Presumption—Proof—Evidence.

Fraud or forgery cannot be presumed or assumed without proof, but the existence of one or both may be established by competent evidence, as other facts are established.

Instructions—Fraud or Forgery.

An instruction, "That fraud or forgery is not to be presumed but must be proved," where qualified by the proof of what was said and admitted as evidence on the issue of fraud, and the whole of which was before the jury, would not so lead them to understand that forgery must be proved by positive and direct testimony; and could not be inferred from the proof of facts.

APPEAL FROM BARREN CIRCUIT COURT.

October 2, 1867.

OPINION OF THE COURT BY JUDGE PETERS:

The first question raised by appellants' counsel is as to the propriety of the ruling of the court below in refusing an instruction asked by appellants to the effect that the lease from Wilkerson to Hurlburt conferred no right upon appellees to maintain this

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action, and *Section 15, chapter 24, 1 R. S. 280-1*, is relied upon to sustain that position. As it is insisted that there is no proof that appellees' lease was "*lodged for record*," and recorded prior to the execution of the lease to appellants by Wilkerson the lessor of both parties. A sufficient answer to that objection is found in *Sec. 24 of the same chapter, Ibid. 283*, which makes it the duty of the clerk of each county court to record all instruments in writing embraced in any *section* of said *chapter* which shall be lodged for record properly certified. *Or which shall be acknowledged*, or proved before him as required by law. The lease of appellees was acknowledged before the clerk of the county court in which the land was located, after which the law made it his duty to record it without special or further directions from either party, especially as the tax was paid and for all purposes of constructive notice, it must be treated as recorded. In the next place, it is insisted that the court below erred in refusing to let Wilkerson, the lessor, testify in behalf of appellants. In his lease to them, he covenants to keep them in quiet possssion of the premises for the term for which they were leased which was thirty-five years. The lease to appellees contains no such covenant, consequently his interest was not equipoised, but preponderated in favor of appellants who offered him as witness, indeed it is not very certain whether the judgment of proceedings in this case might not be evidence gainst him in an action by appellants against him for a breach of his warranty to keep them in quiet possession, but whether that be so or not, he had a direct interest on the side for which he was offered to testify, and was therefore incompetent.

There remains but one other objection to the judgment deemed necessary to be noticed, and that is to instruction No. 2, which is as follows: "That fraud or forgery is not to be presumed, but must be proved." If by that instruction the jury were to understand that fraud, or forgery must be proved by direct and positive testimony, and could not be *inferred* from the proof of facts, and circumstances usually, or universally attendant on their commission, or as any other facts may be established, the instruction would be misleading, and erroneous. But we do not so understand the instruction, and do not suppose the jury so understood it. The proof of what Hurlburt said to young Wilkerson and others was admitted as evidence on the issue of fraud, and the whole of that evidence was before the jury. Hence the meaning and scope of

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said instruction is, and must have been so understood by the jury, that fraud or forgery cannot be presumed, or assumed without proof, but the existence of one or both may be established as other facts are established by competent evidence. And so understood, it could not be objectionable.

For the reasons already stated the third instruction asked by appellants should not have been given.

Wherefore, the judgment is affirmed.

Harlan & Harlan, for appellants.

Underwood, for appellees.

F. P. BENNINGFIELD v. MARTHA CHRISTIE.

Cost.

The plaintiff is entitled to his cost, although his action is practically defeated.

Judgment—Clerical Misprision.

A clerical misprision is no cause for reversal until a motion to correct has been made in the lower court and overruled.

APPEAL FROM TAYLOR CIRCUIT COURT.

January 27, 1868.

OPINION OF THE COURT BY JUDGE WILLIAMS:

On the return of the cause from this court the court below allowed the proper credits as directed by this court and as appellant did not sustain his original suit in whole or part properly adjusted costs against him. The credit allowed was by reason of a defense which was properly put in to appellees cross suit, and therefore as it did not defeat her entire action, costs were properly allowed her. The original suit went for the entire rescission of the contract which was disallowed.

The error as to the amount of the judgment was a clerical misprision and not a cause of reversal until after a motion to correct in the lower court which was really granted on the motion.

Judgment affirmed.

Montague, for appellant.

J. R. Robinson, for appellee.

J. F. ARNOLD, ET AL., v. C. M. FRANTZE.

Contracts—Aiding Rebellion—Right to Recover.

The mere sale and delivery of property with a knowledge that the buyer intended it for the use of those who were in rebellion against the Government, without some participation in the act itself of giving aid to those in rebellion, was not sufficient to deprive the vendor of the right to recover.

APPEAL FROM HARDIN CIRCUIT COURT

January 22, 1868.

OPINION OF THE COURT BY JUDGE HARDIN:

This court decided in the case of Hedges vs. Wallace, etc., Bush, that the mere sale and delivery of property with a knowledge that the buyer intended it for the use of those who were in rebellion against the Government of the United States without some participation or interest of the seller in the act itself of his giving aid to those in rebellion, was not sufficient to deprive the vendor of the right to recover the price of the property. And according to that decision it seems to us the court below erred in overruling the demurrer of the plaintiff to the third paragraph of the defendant's answer, which presented as a defense the facts only that plaintiff sold the laths to the defendant, knowing his object in buying it was to manufacture from it and supply to the Confederate army cartridges, boxes and other military equipage to be used in making war against the Federal government, without alleging that the plaintiff had any interest or participation in the defendant's contract or undertaking, to furnish such articles to the Confederate Army.

According to this view also, the instruction marked "S" ought not to have been given, but it does not appear from the record that the ruling of the court in giving it was excepted to.

But the judgment is deemed erroneous, for the error in overruling the plaintiff's demurrer as we have indicated.

Wherefore the judgment is reversed and the cause remanded for a new trial and further proceedings not inconsistent with this opinion.

Raed, for appellants.

Cofer, for appellee.

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C. J. WATHAN AS ADMR., v. JAS. S. SHORT'S ADMR.

Default Judgment—Answer and Cross Petition—Pleading.

A subsequent answer and cross petition after default judgment rendered, to be presented and filed, must show as grounds for vacating or modifying judgment, either unavoidable casualty or misfortune which had prevented an appearance and defense, or for newly discovered material evidence which could not before with reasonable diligence have been discovered and produced.

APPEAL FROM HART CIRCUIT COURT.

January 25, 1868.

OPINION OF THE COURT BY JUDGE HARDIN:

The appellant, as administrator of Bunnell, having been properly brought before the court as defendant to the action, and failing to assert his claim under the mortgage from Garvin and wife, the court rightly rendered the final judgment in bar of that claim, and the answer and cross petition subsequently presented ought not to have been filed or entertained unless the facts alleged in it constituted grounds for vacating or modifying the judgment either for some unavoidable casualty or misfortune which had prevented appearance and defense, as contemplated by the 7th subdivision of section 579 of the Civil Code, or for the newly discovered material evidence which could not before with reasonable diligence have been discovered and produced according to sections 369 and 373 of the Code. Testing the pleading offered by the requirements of either of these provisions of the Code, it seems to us to have been clearly insufficient, and was therefore properly rejected. It neither discloses any reason why the appellant should not as a vigilant litigant have set up his claim in proper time, nor the discovery of any fact which he might not easily have known as soon as he was served with process as a defendant in the action.

Wherefore, the judgment is affirmed.

Dawson, for appellant.

Barnett & Edwards, for appellee.

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W. B. CORLEY, EXR., v. MARY HAL, ET. AL.

Wills—Construction—Intention of Testator.

A testator devised his property by will, and after the payment of his debts and two specific legacies, directs that "the residue of his estate shall be equally divided between his son W. B. Corley, his daughter Mary H. Hall, and R. C. Neal, and Aquilla Neal, the heirs of his deceased daughter Susan O. Neal to have 'one share' when they became twenty-one years old; and Matilda D. Corley, the only heir of his deceased son Aquilla D. Corley, to have one hundred dollars more than an equal fourth part of his estate after his sister Nancy Wood shall receive twenty-five dollars." And "in the event that either of the infant heirs, R. C. Neal, Aquilla Neal or Matilda D. Corley, shall die without an heir, their respective share shall return back into or remain in my estate and be equally divided between my surviving children, etc." One of the minors died childless and it is **Held**, that it clearly appears, after the payment of specific legacies, the residue of the estate should be equally divided into four parts, and that the devisees should take per stripes, and that there is nothing in the context which could be construed into an intention to give either branch less than one-fourth.

APPEAL FROM SHELBY CIRCUIT COURT.

January 18, 1868.

OPINION OF THE COURT BY JUDGE PETERS:

The testator in the second clause of his will after the payment of his debts and two specific legacies, directs that the residue of his estate shall be equally divided between his son, W. B. Corley, his daughter, Mary H. Hall, Richard C. Neal, and Aquilla Neal, the heirs of his deceased daughter, Susan O. Neal, to have "one share" when they become twenty-one years old, and Matilda D. Corley, the only heir of his deceased son, Aquilla D. Corley, to have one hundred dollars more than an equal fourth part of his estate after his sister, Nancy Wood, shall receive twenty-five dollars.

And in the third clause provides that in the event that either of the infant heirs, viz: Richard C. Neal, Aquilla Neal, or Matilda D. Corley shall die *without an heir*, their respective *share* shall return back into and remain in my estate, and be equally divided between my surviving children or grandchildren as the case may be."

Aquilla Neal died in his minority, and childless, and the question raised by this suit is, who will take his share of the estate, or whether the testator intended by the words "*without an heir*" that if either of his said grandchildren died "*childless*," his or her portion of the estate should go to the surviving devisees?

The will is unskillfully drawn, and it is somewhat difficult to arrive at a satisfactory conclusion from the third clause isolated, or in connection with the other clauses, what the testator intended by the words *without an heir*. But it clearly appears after the payment of the specific legacies, that the testator intended the residue of his estate to be divided into four equal parts, and the two Neals should have one share or fourth thereof, he intended that the devisees should take *per stripes*; and there is nothing in the context which can be construed into an intention to give either branch less than one fourth. Nor which will authorize a departure from the literal interpretation of the words. It is obvious that the testator used the word "*heirs*" without understanding its legal and technical meaning; and it is not improbable that he believed if either of said grandsons died, the survivor would take as his heir.

Concurring in opinion with the court below, the judgment is therefore affirmed.

Montfort, for appellant.

Caldwell, for appellees.

MORGAN McMAHAN, ET AL, v. ROBINSON COBB.

Bill of Exceptions—Time to File.

A bill of exception filed at a subsequent term of the court with an order extending the time, will not be considered by the Court of Appeals.

New Trial—Exception.

If no exceptions are taken at the time, to the ruling of the court below in granting a new trial, if any error is committed the same must be regarded as waived.

APPEAL FROM LYON CIRCUIT COURT.

January 23, 1868.

Opinion of the Court.

OPINION OF THE COURT BY JUDGE PETERS:

No bill of exceptions signed by the Judge was taken at the term at which the new trial was granted, and the time for making the same not extended by the order of Court, consequently, so much of the bill of exceptions filed at the subsequent term of the court as narrates the history of the former trial cannot be considered, nor was any exception taken to the ruling of the court below in granting the new trial at the same time, so that many error was Committed the same must be regarded as waived.

Upon the second trial no objection was made to the testimony offered by appellee, which strongly conduced to sustain the issue of facts presented by the pleadings, and as no instructions appear from the bill of exceptions to have been asked for by either party or given, we perceive no error available for reversal.

Wherefore the judgment is *affirmed*.

Watkins, for appellant.

R. C. MANSFIELD v. SAMUEL MANSFIELD'S ADMR.

Clerical Misprision—How Corrected—Jurisdiction.

The allegations in a petition suing for the recovery of a debt of some \$2,055.00, showed only an obligation for one-half that sum, yet the prayer asked for a judgment for the whole amount, and a verdict was rendered accordingly. Held, to be a clerical misprision, which could only be corrected on a motion in the lower court and until acted on by it, the Appellate Court has no jurisdiction.

Pleadings—Petition—Allegations—Prayer—Default Judgment.

The allegations and not the prayer in a petition should control a judgment by default.

APPEAL FROM HART CIRCUIT COURT.

January 31, 1868.

OPINION OF THE COURT BY JUDGE WILLIAMS:

The allegations of the petition only authorized a recovery for

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half the sum of \$2053.83 paid by Samuel Mansfield as the surety of Washington Mansfield, it being averred that the latter was insolvent and that appellant was co-surety with appellee in the debt, though the latter was the drawer and the appellant an indorser, and Washington Mansfield the acceptor of the bill, therefore, the judgement for the entire sum was a clerical misprision which must be corrected on motion in the lower court and until acted on by it this court has no jurisdiction of the matter. The allegations of the petition present a good cause of action for one half of \$2053.83, and being unanswered we cannot reverse because the petition fails to show a cause of action. The allegations and not the prayer of the petition should control a judgment by default. Judgment affirmed as to the latter.

Reid & Murray, for appellant.

Edwards, Lewis & Cockrill, for appellee.

SIDNEY LYNCH ET AL v. ANDREW SHEPHERD ET AL. . . .

Answer—Petition—Pleading—Attachment.

After issue made and trial begun upon the merits of a case, it is too late for an objection to the petition or attachment for want of verification.

APPEAL FROM ESTILL CIRCUIT COURT.

January 10, 1868.

OPINION OF THE COURT BY JUDGE WILLIAMS:

The written memorial of the contract having been lost the parol evidence as to its provisions are somewhat contradictory; still it preponderates to establish that appellants were to deliver the hundred and odd of sawlogs at the mouth of Stanton's Camp Creek on the first sufficient tide to get over the two mill dams below where the logs then were.

This contract was made in the spring of 1856, during the winter of 1856-7 some ninety-two of the logs were floated over

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singly to be rafted below the dam and above the mouth of the creek, and were there imperfectly rafted, but not in so complete and perfect a manner as provided for in the contract.

So if really tendered, about which there is also some contrariety of evidence the tender would not have been good. The appellees refused to take the logs unless the sap of the logs which was then in a decaying state should be left cut of the measurement, which appellant's agent positively refused. Appellants had removed from Kentucky to Missouri after the contract was entered into and before the attachment was sued out, taking with them nearly or quite all their available property. They had received one hundred dollars advance on these logs, and though there is some contrariety of evidence as to the sufficiency of tides in the creek, yet perhaps the preponderance is in favor of there being sufficient, during the winter of 1856-7, and before the bringing of this suit.

The preponderance of the testimony is in favor of nine to ten cents per inch diameter as being the value of the logs at the mouth of the creek when these should have been then delivered, whilst seven cents was the contract price. therefore. it justified the judgment for the hundred dollars advance with interest thereon and for the fifty dollar damages.

There is no affidavit to the petition or any of the answers in the record, these have either been left out by the clerk or by common consent of both parties; the pleadings were made up without them, however this may be, the petition avers the removal and non-residency of appellants as a cause of attachment and the evidence establishes it.

The appellants answered without objecting to either the petition or attachment for want of verification and having made issue and gone to trial upon the merits it is now too late to object.

Judge Quinn's character was attempted to be impeached, yet this seems to have been more political than otherwise, besides being sustained by numerous witnesses, it appears he had been often elected to office in Estill county and had never been defeated when a candidate, either for sheriff, clerk, county judge or county attorney; to suppose the people of the county would repeatedly elect a man to office whose moral character was such as to authorize a disbelief of his evidence it is to suppose a more public demoralization than this court is disposed to entertain towards the

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people of any county in the State, and had the facts detailed by him been sufficient in law to defeat this action, we should not have hesitated to give credence to them.

Judgment is affirmed.

Turner, for appellant.

Barnes, for appellee.

W. S. MELLO v. NANCY ANDERSON'S HEIRS.

Judgment Constructively Vacated—New Trial Without Objection.

On a motion for a new trial, and to set aside a verdict and judgment rendered against appellant, no order appears to have been entered disposing of the motion, and the parties proceeded to try the issues again without regard to the former judgment: Held, that in the absence of objection by the defendant on that ground, the former judgment was constructively vacated by subsequent proceeding, and defendant regarded as having waived his right to said objections on the last trial and judgment.

January 14, 1868.

APPEAL FROM GRAVES CIRCUIT COURT.

OPINION OF THE COURT BY JUDGE HARDIN:

Although no order appears to have been entered setting aside the first verdict and judgment rendered in the case on the plaintiff's motion for a new trial as the parties proceeded to try the issues again without regard to that judgment and the defendant interposed no objection on that ground or the motion for a new trial, it seems to us, said verdict and judgment for the defendant were constructively vacated by the subsequent proceedings, and the defendant should be regarded as having waived his right to object on that ground to the last trial and judgment.

The instructions copied in the record are not identified or even referred to in the bill of exceptions, nor does it appear that they were the only instructions asked nor that others not copied in the record, were not given. In fact the instructions copied are not

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so certified or referred to by the court as to be regarded as part of the record. We cannot therefore adjudge that the court committed any error in its ruling as to instructions given or refused.

The verdict of the jury appears to have been authorized by the evidence, and it seems to us that the defendant's motion for a new trial was properly overruled.

Wherefore the judgment is affirmed.

Rodman & Bradley, for appellant.

Anderson, for appellee.

W. E. JARDON v. S. WILLIAMS.

Notes—Federal Stamp.

A note on which the original petition was filed having been excluded, on the plea that it was void for want of a revenue stamp; Held, that appellant was estoppel from objecting to an amended petition on the oral contract, for which the note was given.

APPEAL FROM ANDERSON CIRCUIT COURT.

December 19, 1867.

OPINION OF THE COURT BY JUDGE ROBERTSON:

The motion which the original petition was filed having been excluded at the appellant's instance on the plea that it was void for want of Federal stamp, he was estopped from objecting to the amended petition afterwards filed on the oral contract which was a good cause of action, if the note was void.

The testimony authorized the deduction that the appellee's slave was bought by the appellant for \$1,000 assumed to be paid on condition that the slave should be accepted as appellant's substitute as a drafted soldier in the Federal army, and that he was so received and thereby exonerated the appellant.

We perceive no error in the admission of testimony, or in the giving or refusing of instructions.

Wherefore the judgment is affirmed, as sustained on the amended petition if the note was void, or on the original petition if the note was binding.

Harlan, for appellant.

Draffin, for appellee.

JAMES M. LAWSON'S ADMR. v. B. F. DOTY

Judgment by Default—Pleadings—Sufficiency of Petition—Administrator—Action Against.

A petition was filed against the sureties on a constable's bond, and against the administrator of the deceased constable, for failure to pay over money collected on claims put in his hands for collection as constable. No defense was made to the action, and a personal judgment was rendered against the administrator and the two sureties: Held that without allegation or proof that any assets came into the hands of the administrator, it was erroneous to render a judgment against him, and even with such proof the judgment against him could be only for the debt, interest and costs to be levied of assets in his hands to be administered.

APPEAL FROM GARRARD CIRCUIT COURT.

December 6, 1867.

OPINION OF THE COURT BY JUDGE PETERS:

This action was brought against James M. Lawson, Wm. McCarby and Wyatt Parkins, on the official bond of Lawson as Constable of Garrard county, the other two being his sureties, for failure to pay over money collected on claims put in his hands for collection as Constable as aforesaid.

After the institution of the suit, the principal in the bond died, and the action was revived against Wm. Lawson, Admr. of James M. Lawson deceased. No defense was made to the action, and a personal judgment was rendered against Wm. Lawson Admr., and the two sureties for the sum claimed in the petition and \$15.40 ten per centum damages on the same. And from that judgment the defendants below have appealed.

The judgment is complained of because there is neither allegation nor proof that any assets came to the hands of the Admr., and that the judgment is personal against him. Certainly without such allegation and proof if it had been controverted by an answer it was erroneous to render judgment against Lawson; and with the proper allegation and proof the judgment against the Admr. could only have been for the debt, interest, costs and dam-

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ages, to be levied of assets in his hands to be administered. Bott's Admr. vs. Fitzpatrick, 5 Mon. 397.

Wherefore the judgment is reversed and the cause remanded with directions for further proceedings consistent herewith.

Bradley, for appellant.

Anderson, for appellee.

SARAH BEALL CARNEY v. JAMES G. LINDSEY'S HEIRS ET AL.

Implied Trust—Purchaser from Trustee, with Notice, takes Property Subject to Trust.

Where land is affected by an implied trust, the purchaser, with notice, takes the property effected thereby, and is substituted for the Cestui Que Trust.

Contracts Between Trustee and Beneficiary—Constructive Fraud—Construction of.

Courts of Equity have prudently established the preventive doctrine of constructive fraud whereby contracts by trustees for acquiring the property of their confiding and comparatively uninformed beneficiaries, are prima facie presumed fraudulent, and will be so adjudged without proof on either side, thus imposing on a trustee buying his beneficiaries, property the onus of satisfactory proof of the reciprocity and integrity of the contract.

Acquiescence by Beneficiary Under Sales of Cestui Que Trust.

Where land is transferred to cestui que trust under an implied contract, acquiescence for a period of 20 years thereafter, in sales made thereunder, for an adequate price of the land at its then value, will bar any subsequent right of the beneficiary to revoke the sale under the imputation of constructive fraud.

September 16, 1867.

APPEAL FROM CAMPBELL CIRCUIT COURT.

OPINION OF THE COURT BY JUDGE ROBERTSON:

William Kennedy, an early immigrant to Kentucky, and who died about the year 1795, devised his estate, apparently large, to

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his only children, James Kennedy and Jannette Beall, wife of Benjamin Beall. In the year 1800 the devisee, James, conveyed to his brother-in-law, Beall, his interest, with some exceptions, in the testator's estate, and as a part of the consideration Beall assumed to pay all the testator's debts.

Among those debts was one to R. E. Cummins for about \$3,500, and of the estate so devised and conveyed two tracts of about 4,424 acres of comparatively poor land in Campbell county, Kentucky, constituted a portion. Beall died intestate in 1808, and his wife, Janette, in 1811, leaving nine children; by the death of those the five surviving, of whom James G. Lindsey's wife and the appellant, Sarah B. Carney, were two, and were therefore entitled by descent to two-fifths of the said 4,424 acres of land. In 1822 Kennedy with Thomas D. Carneal and his brother-in-law, Lindsey, and his sureties, replevied a judgment which Cummins recovered for his said debt of about \$3,500, and having, soon afterwards, also enjoined it, the injunction was, in 1830, perpetuated as to all except \$1,152.92 for which an execution was issued on the 11th day of February, 1831, against Carneal and Lindsey, Kennedy, in the meantime, having died.

Under statutory authority previously given to sell any of Beall's interests in his lands for relieving his estate of its impending liabilities, of which the Cummins' debt was one, Carneal and Lindsey conveyed to Carneal himself the 4,424 acres of land *"for the purpose of enabling the said Thomas D. Carneal to surrender the lands herein conveyed to the proper officer in extinguishment of said debt."* And, as the conveyance by Carneal himself did not pass to him a perfect right, and perhaps also as there might have been doubt as to the validity of the legislative authorization, all the heirs of Janette Beall, including the appellant and her husband, conveyed to Carneal their legal title for the purpose, as we presume, of confirming the legislative act and also of satisfying the conveyance to Carneal. The title being thus completed in Carneal, he surrendered the land to the execution under which, being valued at \$13,272, it was all sold for \$400 to Cummins as the highest bidder at the official sale on the 25th of April, 1831, and was therefore subject, for a year, to redemption.

In October, 1831, while the land was thus redeemable, an *alias* execution having been issued against Carneal and Lindsey for the balance unpaid by the sale, the former released to the

latter all his title to the land for the recited consideration of one dollar, the evident object of which alienation was to enable Lindsey to redeem and dispose of the land for the satisfaction of the judgment. And, on the same day, Lindsey sold 800 acres of the land to Graham for \$1,000, and eleven days afterwards paid the balance due on the execution; and afterwards, by the payment of the \$300 and 10 per cent to Cummins, redeemed the land, and thus retained the legal title to 3,624 acres of it.

Lindsey having been Admr. of Beall's estate heavily encumbered with debt and not appearing to have made a final settlement, the appellant and her husband, on the 28th day of May 1833, for the recited consideration of five hundred dollars (\$500), sold and conveyed to him all their residual interest in the unsold estate with this qualifying declaration: "It being expressly understood that the conveyance is not to be construed in any event to pass the title to any tracts of land heretofore sold by them."

In the same year Lindsey died intestate, suddenly, with cholera, leaving seven infant children as his heirs, who claimed and used the land as their own. And in August, 1856, Carney died, his wife, the appellant, surviving. And on the 23d day of July, 1859, she brought this suit in equity for recovering one fifth of the 3,624 acres of land still claimed by her as resulting from the foregoing facts. The Circuit Court having finally dismissed her petition, she prosecutes this appeal from that judgment.

Carneal was not a purchaser for his own use. The evident object of investing him with the legal title was only to enable him to subject to the satisfaction of the execution against Lindsey and himself as much of the land as might be necessary for the purpose and in that way fulfill to that extent the purpose of the legislative enactment and of the conveyance by the heirs of Justice Beall. Consequently, after satisfying the execution by a sale of a portion of the land, a trust would have resulted to the use of those heirs to the extent of the residue. And, thus holding as trustee with Lindsey's knowledge, his conveyance to Lindsey was subject to the same implied trust, only substituting Lindsey for himself. When, therefore, by the sale of 800 acres of the land, and by other means, Lindsey redeemed the land and paid the amount of the execution, he held the residual 3,624 acres on an implied trust for use of the five heirs of Janette Beall, subject to a lien for whatever he may have paid with his own means. But, notwithstanding

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the long and elaborate preparation of this case, the record does not show satisfactorily what he paid in that way. There is not even any allegation that there was anything in his hands as Beall's administrator, and the long lapse of time and other circumstances conduce to show that nothing was due on that account. Nor does it appear that he had appropriated either to his own use or to the payment of the Cummins debt the proceeds of any other land than the 800 acres sold to Graham. In this state of case we should be inclined to the presumption that, in paying off the entire Cummins debt, he applied more than \$1,200 of his own funds. And preponderating probability inclines to the presumption that the conveyance of 1833 by the appellant and husband adjusted and closed all previous accounts between them. If that conveyance include the 3624 acres of land in controversy and should not be set aside in equity, the appellant has no available claim to any portion of that land.

The appellants' conveyance to Carneal was a sale divesting her interest only to the extent of land finally appropriated to the extinguishment of the Cummins debt, for discharging which that trust sale was made. Consequently, when Lindsey, as implied trustee, paid that debt, her interest in the 3624 acres remained unsold, and her resulting equity therein was a vendible right of which she had never been divested by sale or otherwise. She had by previous sales parted with her interest in two other smaller tracts of land, and probably had an unsold interest in some other lands than the 3624 acres. But how far any such doubtful interest was then available or of what estimated value there is neither proof nor allegation in this record. We should, however, presume, from all the apparent circumstances, that it was of questionable availability and of inconsiderable value. Owning, as the appellant did, her beneficial interest in the 3624 acres at the date of her contract with Lindsey in 1833, her conveyance to him of all her unsold interests in lands inherited from her father, included her then available and, in the essential sense, unsold interest in that tract. Whether that conveyance was binding and divested her of that interest is a question of more difficult solution.

When that contract was made Lindsey held the legal title—subject first to his own probable lien—in trust for her and her co-heirs. And, to *prevent* fraud in such cases—in which the temptation is so peculiarly strong, the means of success so ample,

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and the proof of actual fraud so difficult—courts of equity have prudently established the preventive doctrine of constructive fraud whereby contracts by trustees for acquiring the property of their confiding and comparatively uninformed beneficiaries are *prima facie* presumed fraudulent, and will be so adjudged without proof on either side, thus imposing on a trustee buying his beneficiaries property the onus of satisfactory proof of the reciprocity and integrity of the contract.

But is there such proof in this case? We think there is, remotely and inferentially, enough.

Actual sales of the land constitute the best evidence of its value. The 800 acres sold to Graham may be presumed to be the best of the tract, and Graham paid only \$1.23 an acre. A sale afterwards of another portion under execution against Lindsey's heirs brought only 75 cents an acre, and the estimates of the witnesses as to the average value of the entire tract, when carefully analysed are not essentially different from Carneal's valuation at 50 cents an acre, at this rate, or even something higher, the 3624 acres at the date of the appellant's conveyance to *Lindsey*, deducting his wife's fifth part, would not have been more than sufficient to reimburse him the amount then due to him for redeeming the land and paying the Cummins debt with its incidental interest and long accumulating costs. And there is neither proof nor ground for presumption that he acquired by her conveyance any other available property to the extent of the \$500 paid to her for her interest in her father's estate. Apparently, therefore, the consideration for her conveyance of 1833 was adequate and the contract fair and understandingly made.

But this deduction, however questionable without the confirmation of time, is, as we think, conclusively fortified by her apparent acquiescence for 20 years and in long after sales to subpurchasers who are parties and until after the land, from adventitious circumstances, had very much increased in vendible value. Although she was covert until about three years before she brought this suit, yet the record shows that her own self will controlled her husband in the management of their affairs, and especially those that were more hers than his.

Consequently, waiving the question of protection to purchasers in good faith under her conveyance to *Lindsey*, it seems to this Court that the appellant's unnecessary and presumptive

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acquiescence, as well as that of her husband, in their conveyance of 1833 to Lindsey sealed it as valid and free from the imputation of constructive fraud, and now closes the door of equity against her stale and antiquated claim.

Wherefore, concurring with the circuit court as to the validity and effect of the appellants conveyance to Lindsey, this court cannot disturb the judgment of that court, which is therefore affirmed.

Stevenson & Meyers, for appellant.

Hallam, for appellees.

JOHN STEGAL ET AL., v. JAMES BROOKE.**Appeals—Cross Appeals.**

A party has no right to a cross appeal where there has been no appeal from the judgment in his favor.

Wills—Married Women.

Mrs. Anderson being a married woman could make no will except in pursuance of a power and her father's will devising to her the land in contest did not give this.

Adverse Possession—Evidence—Will.

A will otherwise inoperative is competent to prove how the devisee held title and that his holding was in his own right and adverse to the world.

APPEAL FROM LINCOLN CIRCUIT COURT.

June 27, 1868.

OPINION OF THE COURT BY JUDGE WILLIAMS:

Appellants having recovered what they claimed of Stephen Cummins in the 21 acres of land did not appeal from the judgment as to him; but their claim as to the 129 acres then in possession of John Brooke being rejected they did appeal as to this. This, then, being no appeal by Stegal et al against Cummins he could not take a cross appeal, but if dissatisfied with the judg-

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ment must sue out an appeal from the clerk of this court, therefore, it is not necessary to determine whether the plea of limitations as to his cross appeal was in time or not, it being filed after submission, the cross appeal of Cummins is therefore dismissed without prejudice.

Mrs. Ann Anderson being a married woman could make no will except in pursuance of a power and her father's will devising to her the land in contest did not give this.

But still the will was competent to show how her son to whom she devised the land held and that his holding was in his own right and adverse to all the world and especially towards his half brothers and sisters, children of his mother by another father. The will of the testatrix Ann Anderson was admitted to record in the year of 1829 and this suit was not brought until July 16, 1856, some twenty-seven years thereafter, the statute of limitation is relied on as a bar among other defences. There is nothing in the record to take the case out of the operation of the statute and this was sufficient reason for the courts adjudging against plaintiff's claim to the 129 acres.

The judgment in favor of plaintiffs for five-sixths of the 21 acres manifests that the court regarded Mrs. Anderson's will as insufficient by itself to convey the land, but adverse possession under it may by lapse of time perfect the title under it.

Wherefore, the judgment is affirmed.

Bradley, for appellants.

Dunlap, for appellees.

WM. LUCAS v. OSCAR BOYCE AND WIFE.

Pleading—Sufficiency of Petition—Suit on Written Instrument.

It is essential to entitle a plaintiff to relief that he should set forth in his petition, if he sues on a writing, the covenants, of the defendants, and the breach for which he seeks redress, and the writing or a copy should be filed and made part of the petition.

APPEAL FROM SCOTT CIRCUIT COURT.

OPINION OF THE COURT BY JUDGE PETERS:

A judgment having been rendered in the Court below against appellant by default, he has appealed to this Court, and the only question is whether the facts stated in the petition, are sufficient to constitute a cause of action.

The action was brought in equity against the personal representative, and heirs of one McDowell deceased, who was the guardian of appellee Mrs. Boyce, and against appellant as the surety to recover the amount of estate of the ward received by the guardian in his life time.

The covenant which was, or should have been the foundation of the action is not referred to in the petition, nor is a copy made a part thereof. It is neither set forth in terms, nor in substance, and it is not even alleged that the guardian, and his surety covenanted to pay over the estate which might come to the hands to the former either to the ward, or to any one for her.

It is essential to entitle a plaintiff to relief that he should set forth in his petition if he sues upon a writing, the covenants, or undertakings therein, of the defendants, and the breaches for which he seeks redress, and the writing, or an official copy if it is an official paper should be filed and made a part of the petition. This is required by the Civil Code.

It is apparent therefore from the foregoing statement that the petition does not contain facts sufficient to constitute a cause of action. Wherefore the judgment is *reversed*, and the cause remanded with directions to permit appellees to amend their petition if they should within reasonable time, offer to do so, and further proceedings consistent herewith.

Polk & Cantrill, for appellant.

Shepard, for appellee.

EPHRIAM HEATH v. P. H. BECKHAM, ET AL.

Land and Conveyances—Partition—Legal Title Holder—Parties.

Where the legal title to land in contest is in one not a plaintiff nor defendant to the action, he cannot be concluded nor his title passed by the pleadings, proof, or judgment to which he was no party.

APPEAL FROM CALLOWAY CIRCUIT COURT.

December 6, 1868.

OPINION OF THE COURT BY JUDGE ROBERTSON :

This case, as presented by the record, is scarcely intelligible. But enough appears to require a reversal of the judgment.

As the legal title to the land in contest seems to be in John O. Heath he could not be concluded nor his title passed by the pleadings, proof, or judgment to which he was no party. The conveyance by Ephriam Heath does not appear to have been made by John O. Heath, through Ephriam as his agent, nor was the agency proved or ever litigated. The judgment allotting the land among the contesting parties without making J. O. Heath a party was therefore erroneous and no legal title could vest in any of them by contract or judgment.

2. As the petition shows that the petitioner had sold all his interest to Gardner, the latter ought to have been plaintiff or co-plaintiff, and to entitle himself beneficially to any judgment he ought to have pleaded and claimed relief. In this respect also the judgment is erroneous; and Gardner, as well as Heath, may be deemed an appellant.

3. The contract imparts that Beckham and Curd were mere trustees to sell, and that in the event of a sale for not less than one dollar an acre, E. Heath was to have one-half of the proceeds and Beckham and Curd each one-fourth; and both Heath's petition in this case and Beckham's in another case seem so to understand the contract. But the trustees never sold the land, and therefore neither Curd nor Beckham seems to have been entitled to any beneficial interest in the land according to that contract. Yet Beckham sold to Covington for less than the one dollar per acre, the south-east quarter, and E. Heath sold to Gardner the north-

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east quarter, each vendor claiming what he sold under a new contract or rather the original contract alleged to have been so intened, but otherwise expressed through mistake, offered to be corrected by an amended petition which the circuit court would not permit to be filed. In this state of case the deposition of the appellant Heath was admitted to prove that Beckham was entitled to one-half and Curd to nothing; and, as Heath had no interest in that question, he was so far a competent witness. He also testified that, by an agreement between himself and Beckham, he was to have the north-east quarter and Beckham was to have and might sell the south-east quarter, as he did to Covington. Nevertheless the judgment gave to Beckham an undivided half of both sections, to Curd one-fourth, and to the appellant Heath only one-fourth. This was erroneous, and especially in allotting to Heath only one-fourth. There is nothing to show how under the original contract, Curd acquired an equitable right to one-fourth of the land, nor how E. Heath, if ever entitled to any portion of it, could be reduced to one-fourth, nor how Beckham was entitled to any portion except by his oral contract with Heath waiving the sale of the trustees and conceding one-half of the land to Beckham which he has shown no legal authority to do, and which would moreover make Beckham's interest larger than Heath's petition represented.

4. It seems to us that the circuit court also erred in not permitting the amended petition to be filed, and in adjudging costs against appellant Heath.

Wherefore the judgment is reversed and the cause remanded for further proceedings, including the filing of an amended petition, pleading by Gardner, the making of J. O. Heath a party, and the taking of further proof, excluding the deposition of Beckham as incompetent to prove his viva interest.

JOHN SPURLOCK *v.* WM. J. MAYO.**Evidence—One Defendant not Competent Witness for His Co-defendant.**

A petition seeks a settlement of a partnership and recovery against Spurlock and Mayo, who, with the plaintiff, composed the firm of H. K. Spurlock & Co. H. K. Spurlock failed to answer, but defendant, W. J. Mayo, filed his answer controverting the claim of plaintiff to any relief and obliging a settlement of the business of the firm by the parties themselves. Held, that H. K. Spurlock would not be a competent witness for Mayo because of his interest in the issue between the plaintiff and his co-defendant.

June 27, 1868.

APPEAL FROM FLOYD CIRCUIT COURT.

OPINION OF THE COURT BY JUDGE HARDIN:

The only question to be decided on this appeal is, whether the defendant, H. K. Spurlock, was a competent witness for his co-defendant, Mayo.

The petition seeks a settlement of the partnership, and a recovery against both H. K. Spurlock and Mayo, who and the plaintiffs, it is alleged composed the firm of H. K. Spurlock & Co. H. K. Spurlock failed to answer, but the appellee Mayo filed an answer, controverting the claim of the plaintiff, to any relief and obliging a settlement of the business of the firm by the parties themselves.

It seems to us said H. K. Spurlock was not a competent witness for Mayo, because of his interest in the issue between the plaintiff and his co-defendant, and the court erred in overruling the exception to his testimony. (Civil Code, section 670.)

Wherefore the judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Hazelrigg & Winn, for appellant.

JOHN SOWDER v. MOSES PAYNE'S HEIRS.

Estoppel—Lands and Conveyances—Purchase at Commissioner's Sale.

A purchaser of land at a commissioner's sale, and which was sold as containing 40 or 50 acres, more or less, is estopped from seeking to be relieved of his purchase on the ground that there was only 36 acres in the tract bought by him. Having purchased the tract in gross and with knowledge of all the facts, he took upon himself voluntarily the risk as to the quantity.

APPEAL FROM ROCKCASTLE CIRCUIT COURT.

June 9, 1868.

OPINION OF THE COURT BY JUDGE PETERS:

This appeal is prosecuted from a judgment confirming the master's report of the sale of the land sold under the judgment for a sale of the land contracted by Moses Payne deceased, in his life time to A. J. Payne, and is upon the same record and is heard with the appeal of A. J. Payne vs. Payne's Administrator, &c.

Appellant complains that the land which he purchased at the Master's sale on a survey fell far short of the quantity represented, and was less than he believed the contract contained when he purchased, and on that ground seeks to be relieved from his purchase.

The land was offered to be sold as a tract containing forty or fifty acres more or less, appellant was well acquainted with the land as must be assumed from the facts in the record, his bond for the price bid by him for the land recites that it contains 50 acres "more or less" and although there are only 36 acres and a fraction in the tract he purchased it in gross with a knowledge of all the facts, and took upon himself voluntarily the risk as to the quantity, and the court therefore properly overruled his exceptions to the sale. Wherefore the judgment confirming the sale is affirmed. Appellant will not be taxed with a copy of the original record.

Carter, for appellant.

THOMAS RUDY v. COMMONWEALTH.

Appeal and Error.

Errors by the trial court cannot be available in the Appellate Court, unless excepted to as allowed by section 275 Criminal Code.

Judgment—New Trial.

The refusal of the trial court to grant a new trial on the ground that the verdict of the jury was not sustained by the evidence, is not subject to revision by the Appellate Court. By section 349 Criminal Code, "an error in granting or refusing a new trial," is not one which is sufficient to reverse a judgment.

APPEAL FROM M'LEAN CIRCUIT COURT.

June 9, 1868.

OPINION OF THE COURT BY JUDGE HARDIN:

If the court erred in any ruling as to instructions, asked or given in this case, the error is not available in this court, since such ruling does not appear to have been excepted to, as allowed by section 275, Criminal Code, (*Barnes vs. Commonwealth*, 3 Met. 13.)

Nor is the action of the court in refusing to grant a new trial on the ground that the verdict of the jury was not sustained by the evidence, subject to revision in this court. By section 349, Criminal Code, "an error in granting or refusing a new trial" is not one which is sufficient to reverse a judgment. (*Murphy vs. Commonwealth*, 1 Met. 366.)

The judgment is therefore affirmed.

Owen, for appellant.

J. W. SCALE v. G. D. CHAMBERS.

Cause of Action—Seizure and Removal of Property by Aiding and Inciting—Demurrer.

A petition that alleges the unlawful seizure and removal or conversion of property of the plaintiff by Confederate soldiers, and that the defendants, citizens of the county, were at the time aiding, inciting and advising the same, and that they directly and indirectly participated in said seizure and removal of the property and aided therein, is Held to constitute a valid cause of action, and a demurrer thereto should have been overruled.

APPEAL FROM OWSLEY CIRCUIT COURT.

June 8, 1868.

OPINION OF THE COURT BY JUDGE HARDIN:

The petition in this case alleges the apparently unauthorized and unlawful seizure and removal or conversion of the appellant's property by Confederate soldiers and the appellee and Camood, who are not alleged to have been soldiers but citizens of Owsley county, were at the time aiding, inciting and advising the same and that they directly and indirectly participated in said seizure and removal of the property and aided therein.

These facts, if true, constituted a valid cause of action against the appellee, and in our opinion therefore the court erred in sustaining the general demurrer of the defendant and in dismissing the petition.

Wherefore the judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Burnam, Caldwell, for appellant.

DAVID L. BROOKS v. WILLIAM MORROW.**Guardian's Bond—Counter Security—Right of County Court to Release.**

When it is required of a guardian, and he gives his surety counter-security it may be proper and the county court might be authorized to release the surety requiring the counter security of the guardian. But until such requirement is complied with the court has no authority to release any surety .

Same.

The counter-security contemplated and required is the execution of a bond or covenant by the guardian with one or more good sureties, approved by the court, who must undertake faithfully to discharge the trust of guardian and to secure the surety making the application from loss and all the liabilities he may have incurred by reason of having been bound as the surety of the guardian. Less than that, the court has no legal power to do, and until that is done, the former surety remains bound.

Bond—Construction of its Sufficiency—Release of Surety—Right of Wards to Sue Guardian or One or More of the Sureties.

A bond that does not show the name of the guardian, ward or surety, though signed by guardian and his surety, is held not to be a sufficient bond as is required by Statute, or sufficient as an indemnity to a former surety who makes demand for new security, and will therefore not release the former surety. The wards have the right to sue the guardian alone, or with one or more of his sureties, and a judgment against one of such sureties, he cannot reverse because the other sureties were not made parties to the suit.

May 22, 1868.

APPEAL FROM BULLITT CIRCUIT COURT.**OPINION OF THE COURT BY JUDGE PETERS:**

In August, 1854, William Shain was appointed by the Bullitt County Court guardian for William and Nathan Morrow, and executed a covenant to the Commonwealth with Woodford McDowell as his surety.

In 1858, McDowell, the surety, apprehending Shain was insolvent, proceeded against him for counter security in said court, and, on the 15th of February the following order was made, on

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McDowell's said motion: "This day came the parties by their attorneys, and the defendant elected to give a new bond, and thereupon came into court and executed a new bond to the Commonwealth with David L. Brooks, James Anderson and Alonzo C. Kennison his sureties, conditioned according to law," and a complete bond was executed.

On the 16th of January, 1860, as the record shows, Kennison required Shain to execute a new bond, and as is stated in the order Shain, "Gave a bond with Henry P. North as his surety, who is accepted in the place of A. C. Kennison, security, and said Kennison is released as security on said bond from this date. Said Shain and North, security, executed a bond to the Commonwealth of Kentucky, conditioned according to law. D. L. Brooks and James H. Anderson the other securities and A. B. North are now the securities."

A bond, or paper in blank as to the name of the guardian, ward and surety, but signed by Shain and North is presented as the bond taken under that order. And in December, 1860, on motion of North against Shain for counter-security, Shain was required to execute a bond to North, and a paper precisely such as he signed, is signed by Shain and W. B. M. Brooks.

On the 19th of April, 1867, the Morrows brought their action against Wesley Phelps, curator of the estate of Shain, he having died, and all the persons who signed bonds as his sureties for a settlement of his accounts, and for the amounts due them from their late guardian. The court below dismissed the petition as to McDowell, Kennison, North and W. B. M. Brooks, and rendered judgment against D. L. Brooks and James H. Anderson for the residue of the debt due the plaintiffs after deducting the amount paid by Phelps as curator of the estate of Shain, and D. L. Brooks appeals.

He insists that by the order of the county court purporting to release Kennison, that he and Anderson were also released, and it was therefore erroneous to render judgment against him and Anderson's representative.

It is made by statute the duty of the county court, when a guardian is appointed for a minor, to take from such guardian a covenant with good surety approved by the court to the Commonwealth faithfully to discharge the trust of guardian. Sec. 3, Art. 1, Chap. 43, 1 Vol. R. S., 574.

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After the appointment is made the court may remove the guardian for failing to make settlement of his accounts as required by law, or as may be required by the court, or for failure to give additional security when required. Sec. 13 *ib.* And by the next section it is made the duty of the court annually to inquire into the solvency of the sureties for guardians; and if at any time it has cause to believe that the sureties of a guardian are insolvent, or in failing circumstances, it shall, after summoning the guardian, require him to give additional security. The 15th section provides upon the application of the surety of any guardian and after summoning the guardian, the court may if it believes him to be insolvent, or in doubtful circumstances, require him to give counter-security to his surety, and on his failing to do so, remove him, or order the estate of the ward to be paid over to a new guardian or curator. But if the guardian shall when required give his surety counter-security, it may be proper and the county court might be authorized to release the surety requiring counter-security. But until that is done it is very clear the county court has no power to release any surety.

The counter-security contemplated and required is the execution of a bond or covenant by the guardian with one or more good sureties, approved by the court, who must undertake faithfully to discharge the trust of guardian, and to secure the surety making the application from loss and all the liabilities he may have incurred by reason of having been bound as the surety of the guardian. Less than that, the court has no legal power to do, and until that is done, the former security remains bound.

The paper signed by Shain and North was not such a covenant as is required by law, and wholly insufficient as a guardian's bond, or as an indemnity to Kennison; it is in fact, no bond or covenant; consequently the county court of Bullitt had no power to make the order releasing Kennison, and *a fortiori* appellant was not released. But the failure to render judgment against Kennison is not an error of which appellant can avail himself for a reversal; the wards might have been entitled to a judgment against him as a joint-obligor with their guardian; and they might sue the guardian alone, or with one and more of his sureties, and a judgment against such surety he could not reverse because the other sureties were not sued.

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Judgment affirmed.

Bullock & Anderson, for appellant.

H. H. Field, for appellee.

H. S. McFATRIDGE v. HEROD GORE.

Evidence—Claim for Usurious Interest Established by Assignor Before Release from Original Debt.

An assignee of a claim for usurious interest, who was also surety for the assignor upon the original debt out of which the claim for usury originated, cannot establish the fact of the usury by the evidence of his assignor only, until he shall have released the assignor from responsibility on the original liability for money paid as his surety to the original creditor.

APPEAL FROM MERCER CIRCUIT COURT.

May 29, 1868.

OPINION OF THE COURT BY JUDGE WILLIAMS:

Gore having paid, as security of Morgan, the judgment debt in McFatridge's favor and Morgan insisting that there was a large amount of usurious interest included transferred to Gore his claim therefor.

Gore sued McFatridge and without releasing Morgan and over the objections of McFatridge established his claim by Morgan's evidence.

Although this was but an equitable assignment and perhaps the assignor could not be held responsible to the assignee on the assignment yet there is nothing to show that Gore had released Morgan from his original liability for money paid to his use on account of the suretyship, therefore, every dollar which Gore could recover of and collect from McFatridge would go to reduce Morgan's liability to him, hence Morgan was as much interested in the recovery as if he had sued in his own name. Before Morgan can be competent he must be released from responsibility to Gore on

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the original liability for money paid to his use to McFatridge.

For this error the judgment is reversed with directions for a new trial and further proceedings consistent herewith.

Hooe, for appellant.

Polk, for appellee.

L. B. BATES ET AL v. THOS. JAMES' HEIRS.

Contract for Exchange of Lands—Breach of Covenant—Misdescription in Deed Corrected.

Under a contract for exchange of lands, a deed made subsequent thereto in which the property is misdescribed will be corrected by a chancery proceeding. A mere misdescription in a deed is not a breach of warranty nor grounds for a rescission of contract between the parties.

APPEAL FROM LOUISVILLE CHANCERY COURT.

May 26, 1868.

OPINION OF THE COURT BY JUDGE WILLIAMS:

December 15, 1859, Bates and decedent James exchanged lands, Bates selling James 13 acres near Louisville, Kentucky, for \$13,000, ten thousand dollars of which was paid in lands in Issaquena county, Mississippi, and three time payments of \$1,000 each to be made in money, for which notes were executed, and James of that date executed a deed for the Mississippi lands.

January 23, 1860, Bates executed to James his deed for the Kentucky land, reciting the consideration of 4550 acres of land in Issaqueena county, Mississippi, conveyed by deed of 15th of previous December, at \$10,000, and for his three notes of \$1,000 each, due April 15, 1860, 1861 and 1862.

This land was laid off and designated on a map by quarters, sections and fractions, townships, ranges, &c., and Bates selected and had designated, out of a much larger quantity, the lands to be conveyed to him. James was then living in Memphis, Ten-

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nessee, and Loving, the agent who had mainly been instrumental in making the trade for James, prepared the deed at Louisville, Kentucky, for him to execute to Bates, but made a misdescription of the township in which some of these lands lay.

This is most apparent from the evidence of both Leamy and Bates, as well as other witnesses.

Bates having sold, as he says, his interest without recourse to John Bates his depositions are in—in which he says he went to look at these lands some four or five months after he purchased them and found that some of the lands as described in the deeds lay six miles from where represented, and that James had no title to the lands described, in the deed.

James in his answer says he was at all times willing to correct the mistake by proper deed, that it was a mere misdescription made by the draftsman Loving and Loving establishes this as does virtually the evidence of Bates, his conduct and the circumstances developed. For notwithstanding the discovery of this error was made within a few months after the trade, and most probably before the first note of James to him fell due, still Bates continued to collect the unpaid purchase money, the last note for which was not due until April 15, 1862.

February 16, 1863, ten months after the last payment fell due, and when it had been collected, Bates attached James property alleging an indebtedness of ten thousand dollars on this warranty. James being a non-resident was permitted to file his answer and open the first judgment, under the provisions of the Code.

Upon filing his answer and making the issues the foregoing facts appeared when the court rescinded the contract, adjudged against Bates the three thousand dollars purchase price paid by James, with \$1,308 interest, and deducting therefrom \$2,684, for the rents and interest, leaving a balance against Bates of \$1,624. From which Bates appealed and cross errors in rescinding the contract are taken.

It is very apparent that though there was a mere misdescription of the Mississippi lands in James deed to Bates, yet the latter was not so much dissatisfied with it as to either bring suit to have it corrected or for a rescission of the contract, though this was discovered within a few months, until he had collected all the purchase money, and the circumstances of the late Civil War had greatly reduced the price and value of the land. That James had

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a good title to the land actually sold, but misdescribed in the deed, is also apparent. That Bates had not gotten the deed corrected was most probably because of his own neglect the circumstances strongly indicate and are not sufficiently rebutted by the evidence of Hyanes.

And that Bates has really a good title to the land actually purchased by him, and which will be entirely perfected by a reformation of the deed, is reasonably certain.

When, therefore, the title can be so easily perfected, and when owing to the altered condition of the country in which these lands lay it would be so unjust to rescind the contract, especially in view of Bates' conduct in the whole affair, we cannot concur with the chancellor in rescinding this contract, but the judgment must be reversed on the cross appeal with directions to the court below on the return of the cause to reform and correct the deed of James to Bates so as to specify the lands actually sold and to dismiss the plaintiff's cause of action as to all other relief.

This view of the case sets aside all necessity of investigating the correctness of the commissioner's report as to rents and profits and damages, which the court confirmed, as such investigation will be wholly irrevelevant on the return of the cause.

Wherefore, the judgment is reversed on the cross appeal, but a reversal on the original appeal is refused.

Brown & Lindsey, for appellants.

Bunch, for appellees.

M. D. LEVY v. S. ULLMAN & Co.

Exceptions to Depositions—Trial.

Exceptions to depositions made in the trial court, and which are not disposed of by the chancellor, are presumed to have been waived.

Fraudulent Conveyance—Attachment—Preferred Creditors.

Where the evidence conduces to prove the fraudulent transfer of property for the purpose of preferring creditors, and the willful appropriation of the assets of a defendant to his own personal use, at a time when he was fully aware of his insolvency, it will justify an attachment by

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the creditors and the decree of the chancellor setting aside such fraudulent transfers of property by defendant, will not be disturbed.

Acts of the Legislature Repealed—Effect of Statutes in Force.

The repeal of an Act of the Legislature will not affect existing suits, commenced under jurisdiction of officers of the court created by such Act.

APPEAL FROM JEFFERSON CIRCUIT COURT, CHY. DIV.

May 25, 1868.

OPINION OF THE COURT BY JUDGE PETERS:

An elaborate discussion of the questions mooted by counsel could not perhaps be made interesting, and would not in the end prove more satisfactory than a brief statement of the points involved with the conclusion reached and some of the prominent facts and reasons therefor.

It is shown by the evidence that up to a short time before the commencement of the proceedings against appellant that he had considerable means in his hands, consisting in goods, notes, and other evidences of debts owing to him, and money; these means or a large portion of them rapidly disappeared, while his indebtedness was not materialy, or proportionately diminished, some of his evidences of debts owing him were controverted into cash, and the money not accounted for; there is the transaction of which Barrett speaks whereby the money on a bill of exchange for \$2,550 was realized by a sale of the bill to the bank of Kentucky, and proceeds drawn by appellant some month or six weeks before these proceedings were instituted. And Reedhard proves that he frequently had considerable sums of money deposited on the bank of the German Insurance Company previous to appellees' attachments being sued out; since then he has had no money there. Other sufficient facts may be referred to. Appellant sent goods from Louisville to Vicksburg, Miss., in the early part of the fall 1866, not to a very great amount, and effected an insurance upon them at \$40,000 when Weiskoff, who was acquainted with the business, and value of such goods, estimated their true worth when he saw them soon after the insurance was effected at \$10,000, this witness proves, about the last of October, 1866, appellant sold a large quantity of his goods at wholesale, and when he was doing so the witness remonstrated, and told him he had better do a retail busi-

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ness and he replied it was no business of his, not to speak to him. That he was charged by one of his clerks in the presence of the witness of wanting "*to go crooked*" himself, and endeavoring to get every one doing business for him to walk in the same crooked paths, and warned him that he had not sense enough to make a successful journey on that line, and he did not deny the charge.

On another occasion when in conversation with Harris about his household furniture, he said he had gotten his brother-in-law to attach it "*so as to keep his other creditors from attaching it and he would bid it in for him,*" and that he was glad his Louisville creditors had attached his property there as he would not have enough to pay all his creditors, he preferred that they should be paid.

These with other facts that appear in the record and might be named conduce strongly to the conclusion that a portion of the means of appellant which should have been applied to the satisfaction of his debts, were otherwise disposed of to evade the payment of his existing liabilities.

As the exceptions to depositions were not disposed of by the chancellor, it must be presumed they were waived.

By the 11th section of the Act approved 23d December 1861. It is provided that "*All orders for attachments under this act, or any other law may hereafter be made, and granted by any judge of a circuit, or county court, or by the Clerk of the Court, or justice of the peace from whose office such attachment shall issue.*"

This statute which conferred authority on the Clerk to make the order for the attachment, was not repealed when the order in this case was made.

Upon a review of the case no error prejudicial to appellant has been found. Wherefore, the judgment of the chancellor is affirmed.

Kinhead & Fairleigh, Speed, for appellant.

Dembitz, Joseph, Bijur, for appellee.

F. W. STEMMELL ET AL v. THOS. C. WATERS.

Instruction.

An instruction which in effect tells the jury that the measure of compensation for the injury complained of in the petition, is double the fair and reasonable rent of his property for the time he was wrongfully kept out of possession, is held not improper and erroneous.

Attorney's Fee—Two Causes in One Petition.

Where two causes of action are joined in one petition, only one attorney fee can be taxed against the defendant.

APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

November 27, 1867.

OPINION OF THE COURT BY JUDGE PETERS:

The second instruction given for appellee upon a case made out, as this court understands it, would be the law—which in effect tells the jury that the measure of compensation for the injury complained of, is double the fair and reasonable rent of his property for the time he was wrongfully kept out of possession, and this we think is the clear understanding of the opinion. A *bonus* is not provided for in the statute and we do not as at present advised, feel authorized to say that it should form any part of the recovery, and as to the attorney's fee both causes of action are joined in one petition and we are not aware of any law that authorized the allowance of a separate attorney's fee for each branch of the case. This is to be taken as a modification of the opinion and rehearing refused.

(See original opinion 2 Bush 282, 65 Ky. Rep.)

MARY J. CUNNINGHAM v. GEORGE COLLINS AND WIFE.

Pleadings—Answer—Judgment for Costs.

The answer was not sufficient to escape a judgment for costs, but was an admission of a lot belonging to the plaintiffs," is not a denial that she was in possession in fact, but only that her possession is unlawful, nor construed as a plain and simple denial of the title alleged in the petition. Nor does a denial "that she keeps plaintiff out of his rightful property" deny that she held the ground nor that it was the property of the co-plaintiff. The answer was not sufficient to escape a judgment for costs, but was an admission of title in the plaintiffs, and of her own possession.

APPEAL FROM HENDERSON CIRCUIT COURT.

February 7, 1868

OPINION OF THE COURT BY JUDGE ROBERTSON:

The appellant's answer, artfully evasive, denies neither the title of the appellees nor her own actual possession of their ground. Denying that she "*unlawfully* holds possession of a lot belonging to the plaintiffs," does not deny that she was in possession in fact but denies only that her possession is unlawful, nor, qualified as it is, can it be construed as a plain and simple denial of the alleged title. Nor does the denial "that she keeps *plff.* out of *his* rightful property" deny that she held the ground nor that it was the property of his wife, who was co-plff. If she was not in possession she would have said so in simple and unambiguous terms, and thereby not only escaped costs but entitled herself to judgment for costs.

Properly scrutinized and tested her answer, therefore, admits both the title of the appellees and her own possession.

And consequently the judgment against her is right, and is therefore affirmed.

Turner & Trafton, for appellant.

E. A. HENSLEY v. J. G. TRIMBLE.

Bill of Exchange—Set-off and Counterclaim—Purchaser for Value of Bill of Exchange.

A set-off or conterclaim existing between the original parties to a Bill of Exchange cannot be adjudged against an assignee, after the Bill has gone into circulation, in the regular course of business, for a valuable consideration.

Pleading—Demurrer—Issue Joined—Objections.

Though a petition may be defective because of insufficient averments as to the principal causes of action stated, to be availed of a demurrer thereto must be put in before issue joined by defendant answering setting up by way of defense, set-offs and counter-claims. And it is too late to object to the validity of the petition for the first time, before the Appellate Court.

APPEAL FROM WOLFE CIRCUIT COURT.

February 1, 1868.

OPINION OF THE COURT BY JUDGE WILLIAMS:

The writings sued on, though styled and treated by both parties as notes are really foreign bills of exchange drawn at Cincinnati, Ohio, payable at Mt. Sterling, Kentucky, and which had been assigned to appellee. The petition does not aver protest and notice either for non-acceptance or non-payment, nor does it aver any excuse, as that the drawer had no funds with or authority from the drawer to draw upon him, and would therefore have been liable to a general demurrer.

But appellant answered setting up defenses by way of set-off and counter-claim and issues thereon formed and submitted to the court and adjudged by it for \$1,025.25, with interest from May 19, 1866, in appellee's favor.

There is no bill of exceptions containing the evidence, therefore, we must regard the defenses unsustained save so far only as not denied and treating the loaned buggy as not returned and worth the \$75 as alleged, still the judgment does not amount to more, nor indeed as much as the court might have adjudged.

Even if it be conceded that under these issues off-sets and

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counter-claims existing between the original parties could be adjudged against the assignee, which cannot be done as to bills of exchange which have gone into circulation in regular course of business for a valuable consideration, still there is nothing in this case which authorized this court to reverse on this account. But it is insisted that no cause of action appears in the petition and that therefore the judgment should be reversed. However defective the petition might be, because of no sufficient averment as to no funds or authority to draw, yet after issue waiving this and judgment establishing a claim, especially where no demurrer for either party was put in so as to illicit the judgment of the court below on the pleadings it is too late to object for the first time in this Court, no motion for a new trial being made below.

Judgment affirmed.

Simpson, Hazelrigg & Winn, for appellant.

Elliott, for appellee.

HATTIE W. JONES ET AL V. SUSAN JONES.

Pleading—Notice to Surrender Possession in Ejectment—Life Tenancy by Parol Agreement.

Appellee, mother of John S. Jones, deceased entered upon and took possession of a house and lot belonging to the estate under a parol agreement with the intestate before he died, that she was to have same as a home during her lifetime, in consideration of services rendered the intestate during his life: Held, that before appellee could be ejected she would be entitled to notice to surrender possession of the premises to the heirs of the intestate.

September 22, 1868.

APPEAL FROM JEFFERSON CIRCUIT COURT.

This is an action in ejectment by Hattie Jones and others to dispossess their grandmother and mother-in-law, respectively, of a house and lot in Louisville.

John S. Jones, died intestate, possessed of a house and lot in the

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city of Louisville and leaving a widow and two children (appellant in the case) his lawful heirs.

John S. Jones before death placed appellee in possession of the property in compliance with a parol agreement between the deceased and appellee in consideration of service rendered by the appellee during John S. Jones' life time with the understanding that she was to have this place as a home during her life time.

Issue having been joined, a jury was sworn to try and returned a verdict for defendant.

OPINION OF THE COURT BY JUDGE PETERS:

There is no bill of exceptions presented with this record showing the evidence adduced on the trial, and if appellee entered by the direction, and with the assent of intestate, her son, before she can be ejected she is entitled to notice to surrender possession of the premises, and as it does not appear such notice was given her and the court below refused a new trial, we cannot say that the judgment is erroneous.

Wherefore the judgment is *affirmed*.

Furrus & Beckley, for appellant.

Barrett & Roberts, for appellee.

JONATHAN ELLIS V. ROBERT RIGGIN.

Contract for Sale of Land—Rescission—Damages for Breach—Rent.

Upon rescission of a contract for sale of land, damages resulting to the vendee by reason of the failure of the vendor to carry out an agreed rescission between the parties, will be allowed the vendee, it appearing that he vacated the premises at vendor's demand some three months prior to the settlement of the vendor, for which time the vendee would be entitled to his rental of the premises.

APPEAL FROM M'CRACKEN CIRCUIT COURT.

October 17, 1868.

This was an ordinary proceeding to enforce the collection of

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\$300.00, which according to the answer was made as an advancement upon the purchase of a house and lot from plaintiff in Paducah, Ky. No writings were entered into, but by verbal agreement defendant was to pay \$100 down and \$100 in one year after for same. He paid \$300.00 and failed further to comply with agreement; both parties asks a rescission of the agreement to transfer property and defendant sets up a counter claim for \$90.00 for three months rent of the house for which time the property was regarded as defendants by plaintiff, as defendant dispossessed his tenants for that length of time in order to comply with agreement.

From a judgment for \$300, amount sued on, less credit of \$90, amount of rent due defendant, this appeal is prosecuted.

OPINION OF THE COURT BY JUDGE HARDIN:

The facts alleged in the defendant's answer as a counter claim, and fraud, were, we think, at least sufficient to constitute a cause of action for the injury sustained by the defendant by the plaintiff's failure to comply with his agreement, which has caused the defendant to remove his tenants from the house preparatory to giving possession to the plaintiff.

The facts of the case thus presented were tried by the court, and the Judge seems to have estimated the damages sustained by the probable loss of rents, and set it off against \$90 of the plaintiff's demand. And in this we do not perceive any error for which this court should disturb the judgment.

Wherefore the judgment is affirmed.

Husbands, for appellant.

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ELIZA A. STEWART ET AL V. S. E. GILBERT ET AL.

Clerical Misprision.

A judgment will not be reversed for a clerical misprision, until the objection has been presented and acted on by the Court rendering the judgment.

Pleadings—Petition, Allegations as to Ownership of Land.

The Allegation that the property was Mrs. Stewart's and that she exchanged her property for it, are the mere conclusion of the pleader, the character of property whether real or personal and the manner in which she derived title to it, should have been set forth, so as to enable the Court to decide from the facts alleged whose property it was.

APPEAL FROM OHIO CIRCUIT COURT.

OPINION OF THE COURT BY JUDGE PETERS:

If the action was heard before it stood for trial as alleged, that was a clerical misprision Sec. 578 C. C. for which this court would not reverse the judgment; until the objection had been presented and acted on by the court rendering the judgment, which does not appear to have been done in this case.

Besides the facts as alleged in the petition do not state a cause of action, it is alleged that the property sold was Mrs. Stewart's and that her property was exchanged for it; but the petition does not state how she became entitled to it, what kind of property was exchanged, nor how she held it. The allegation that it was hers and she exchanged her property for it, are the mere conclusions of the pleader, or of the plaintiffs, the character of property whether real or personal, and the manner in which she derived title to it, should have been set forth, so as to enable the court to decide, from the facts alleged whose property it was.

Appellants have failed to alleged facts in their petition which would authorize the granting the relief they seek, and if either or both of them shall suffer loss, it is the consequence of a fatal supineness from which the courts can afford no escape.

Wherefore the judgment is affirmed.

Walker & Townsend, for appellants.

M. Henry, for appellees.

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F. R. NEAL v. W. H. JONES.

Land—Sale by Acre or in Gross—Adjustment.

Where there is a doubt as to whether land was sold by the acre or in gross, and the parties having made an equitable adjustment of the matter Courts will not interfere in the absence of fraud or mistake.

Title Bond—Holder Entitled to Conveyance from Heirs or Devises.

The holder of a title bond is entitled to a conveyance of the legal title, whether the obligor died intestate or testate.

Purchase Money.

It is premature to adjudge the payment of purchase money until it is determined who is the legal title holder and to whom the money should be paid.

January 31, 1868.

APPEAL FROM WASHINGTON CIRCUIT COURT.

OPINION OF THE COURT BY JUDGE PETERS:

If there had been any doubt as to the character of the contract for the sale of the land, whether by the acre, or in gross, the parties themselves construed it as of the first named class, adjusted and settled that question, and where as in this case, there was no fraud, or advantage, but the adjustment is equitable, courts cannot interpose to disturb what is properly done.

Having the title bond of J. R. Jones for all the land contained in the survey, which bond describes the tract by metes and bounds, appellant is by the terms of said bond entitled to a conveyance thereof, and whether the obligator died intestate, or testate, the appellant is in a condition to coerce a conveyance from the heirs, or devisees to whom the title may have passed by the death of the obligator, J. R. Jones.

But before he can be properly coerced to pay the note for the surplus and, the question as to whether the title to the land passed by the devisee or descent, and at the death of J. R. Jones, should have been settled; if the title was in appellee, before the court would compel appellant to part with his money, it should see that he got a title to the land for which it was to be paid, as he had

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satisfied the first installment of the purchase price, and thereby by the terms of his contract entitled himself to a conveyance. Moreover if the title to the land was not devised to appellee by his father, so as to enable him to convey the title to appellant, and died intestate, he would not be entitled to the price of the surplus land, upon the sale appellant executed his notes for the quantity he then believed to be in the tract, to J. R. Jones, who gave them to appellee. It is not alleged that he was entitled to anything more for the land than the notes thus given to him by his father; and unless he shows to the contrary, the value of the surplus land would form a part of the estate of the ancestor, and go into the hands of his personal representative, and a payment of the same to appellee would not be a discharge of the debt, although a note may have been given him therefor.

It was therefore premature to adjudge the payment of the money to appellee until the court should be able to determine who held the title to the land, could compel a conveyance and to whom the money belonged. And thereby put an end to any further litigation growing out of said contract.

Wherefore the judgment is reversed, and the cause is remanded with directions.

Twiman, Cofer, for appellant.

Broune, for appellee.

NICHOLAS RICKS v. THOS. O'NEIL ET AL.

Notice—Sufficiency of Pleading.

The failure of a defendant to deny the allegation in a petition "that the defendant had been notified for more than months to surrender possession," must be regarded as an admission of legal notice.

Landlord and Tenant.

A tenant cannot dispute his landlord's title.

January 28, 1868.

OPINION OF THE COURT BY JUDGE PETERS:

From the testimony of Judge Newman it appears that appellant held the possession of the premises as the tenant of appellees, and conceding as such he was entitled to notice to quit it is alleged in the petition that he had been notified more than — months to surrender the possession and he had failed to do so. This allegation is not answered, and must be regarded as an admission of a legal notice to quit the premises.

Anna Cashott as is abundantly shown, died childless, and never had a child, and it is furthermore shown that Lewis Thomas and Eliza were her heirs, capable of inheriting her estate, from whom appellees derive title to the house and lot, she having died intestate. Appellant therefore having no interest in the estate was content to remain there as the tenant of appellees and cannot dispute their title.

The action was brought in equity; but if appellant had desired the case to be tried in ordinary on his motion to transfer the case the judge doubtless would have made the transfer, but whether he would or not, his failure to make the motion must be regarded as a waiver of the right and the action was properly retained, and disposed of.

No available error for a reversal of the judgment exists. Wherefore the judgment is *affirmed*.

McKay, for appellant.

Muir, for appellee.

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W. S. STAM V. J. M. STAM.

Land—Conveyance—Accepted Warranty—Defect of Title—Eviction—Purchase Money.

A purchaser of land who has accepted a conveyance and has not been evicted under any adverse claim cannot avail himself of a defect of title in defense of a suit for unpaid purchase money.

Same—Exception to General Rule.

When the vendor has warranted the title and is insolvent or a non-resident of the state a defect of title may be set up, but the defendant must establish the facts necessary to bring the case within the exception to the general rule.

January 21, 1868.

APPEAL FROM DAVIESS CIRCUIT COURT.

OPINION OF THE COURT BY JUDGE HARDIN:

Although as a general rule a purchaser of land who has accepted a conveyance and has not been evicted under any adverse claim, cannot avail himself of a defect of title even in defense of a suit for unpaid purchase money, yet he may do so when the vendor has warranted the title and is insolvent or a non-resident of the State, but a defendant who seeks on this ground to discharge his liability as a purchaser by setting off that his vendor as warrantee of the title, must establish the facts necessary to bring his case within the exception to the general rule which we have mentioned. In our opinion that has not been done in this case. Thayne, the vendor and defendant in the cross petition, being only constructively before the court, the material allegations of the cross petition were controverted by the law and it devolved on the appellant the burden of proving not only the alleged defect of title, but the non-residence or insolvency of Thayne and the failure of the plaintiff to reply to the answer did not dispense with the necessity of doing so. We do not regard the answer as presenting a counter claim and set off against the plaintiff, but a cross petition against his assignor, Thayne, incidentally affecting his right to recover as assignee of the note in controversy.

We incline to the opinion moreover that as Denson's heirs were

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brought before the court and failed to maintain their claim to the thirteen acres of land alleged by the defendant to belong to them, they are concluded by the judgment from again asserting their claim.

Wherefore the judgment is *affirmed*.

Sweeney & Stewart, for appellant.

Lindsey, for appellee.

M. W. COFFEE v. F. B. COOK.

Title Bond—Assignment—Warranty of Title.

An assignment of a bond for a conveyance of land does import a warranty of the title.

Amended Answer—Not Permitted to Filed—Bill of Exception.

Where the lower Court erred in not permitting the amended pleading to be filed, the error is not available in the Appellate Court as it was not made part of the record by a bill of exceptions or order of the Court identifying it.

January 15, 1868.

APPEAL FROM MORGAN CIRCUIT COURT.

OPINION OF THE COURT BY JUDGE HARDIN:

It is well settled that an assignment of a bond for a conveyance of land does not import a warranty of the title, and only imposes on the assignor the responsibility ordinarily devolved on assignors resulting from a failure of the assignee after due diligence to compel a compliance with the terms of the bond. The notes in controversy in this case being given for part of the consideration of the assignment of the bond given by Williams as guardian of Ferguson it devolved on the defendant, in order to avail the notes, to show either a failure to enforce the covenant of the bond by the prosecution of a suit thereon with due diligence or such other facts as would have entitled the appellant to a recovery against the appellee in consequence of the assignment if the

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entire consideration thereof had been paid such a ground for relief is not, in our opinion, established on the part of the appellant in this case. The answer of Ferguson tendering his deed in compliance with the covenant of his late guardian is a sufficient response to the allegation that Williams was unable to have the title conveyed so far as it vested in Ferguson, and it does not appear that Ferguson had not such title at least as his guardian undertook to sell.

We do not perceive that there was any abuse of the discretion of the court in refusing to permit the amended answer and cross petition to be filed; but if there was, the error is not available in this court, for the reason that the paper copied by the clerk as the amended pleading is not made part of the record by any bill of exceptions or order of the court identifying it as that which was offered and rejected, the descriptive note of the clerk, for that purpose, being insufficient according to repeated decisions of this Court.

Wherefore, the judgment is *affirmed*.

MINERVA SHANNON v. W. W. TRIMBLE.**Bill of Exceptions, Filed at Special Term, Without Objection.**

Objections not made to the filing of a Bill of Exceptions at a special term of the lower Court, cannot be made for the first time in the Court of Appeals.

APPEAL FROM HARRISON CIRCUIT COURT.

January 28, 1868.

OPINION OF THE COURT BY JUDGE HARDIN:

It appears from the record that the bills of exception were filed at a special term of the court, and as no objection was then made to the action of the court, it cannot be made an available objection for the first time in this court.

We do not regard the answer of the appellant as presenting a sufficient set-off or counter-claim to which any reply was required, but, as it seems to us, it sufficiently presents as a defense to the

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action that the note was given in consideration of a claim which had already been satisfied by the payment of usurious interest, and was not merely the subject matter of a claim in favor of Redman for usury paid, liable to be barred by limitation. It is not necessary that this court should determine from the evidence in the record whether the defense was wholly or only partially sustained, but we are of the opinion that the judgment which disregards the defense of usury except to the extent of \$32 is erroneous, and it must on that account be reversed.

Wherefore, the judgment is reversed, and the cause remanded for a new trial and for further proceedings not inconsistent with this opinion:

Ward, for appellant.

Trimble, for appellee.

RANSON DELAND v. WM. ALLEN.

Land—Conveyance—Acceptance—Waiver of Defects in Title—Election Warrants.

When a party accepts a conveyance he thereby waives the defects in the title, so far as they may be a defense to the purchase price and elects to stand on the warranty and therefore must show that it will be unavailing.

Fraudulent Representation—Opinion—Quantity—Quality—Value.

The mere expression of opinion of quantity, quality and value, where the purchaser has an opportunity to judge is not to be deemed either an affirmation amounting to a warranty nor a fraudulent representation.

Title—Slander of—Unliquidated Damage—Set-off—Contract.

The slander of the title of appellant by appellee is a claim for unliquidated damages which cannot be off-set against a claim on contract.

Same—Transfer from Circuit Court to Common Pleas Court, Transfer of Causes.

The act fixing the commencement of the first term in September was a public notice to all litigants when and where their suits would be adjudicated.

January 24, 1868.

APPEAL FROM MEADE CIRCUIT COURT.**OPINION OF THE COURT BY JUDGE WILLIAMS:**

Appellee recovered against appellant a judgment for \$1,000 on his note given as part purchase price for a tract of land.

Appellant's answer shows that a deed of general warranty had been made by appellee and accepted by him, and he neither avers insolvency nor non-residency or the warrantor.

He does allege that a good legal title had not been conveyed to him, because the land had been sold and conveyed by Slaughter to Griswold, in October, 1857, who had retained a lien for \$3,600, and that Griswold had sold and conveyed to Allen in October, 1859, and had retained a lien for \$3,000, and that said liens had not been released of record.

He did not aver that any of said liens are still due and unpaid, even if he could be allowed to plead them at all, because the liens are expressly reserved in the respective deeds of conveyance and were therefore notice to him when he accepted Allen's deed, and the same may be said as to the alleged unconveyed dower right of Mrs. Slaughter, for it is well settled that when a party accepts a conveyance he thereby waives the defects in the title, so far as they may be defenses to the purchase price and elects to stand on the warranty, and therefore must show that it will be unavailing.

The legal title passed by the respective deed, encumbered, however, with the liens therein mentioned, but these may all have been removed, even if it be conceded he might resist a recovery of unpaid purchase price by reason thereof.

Appellant also alleges that appellee falsely and fraudulently represented that there were 200 cords of Tan Bark worth \$5 per cord, but it is evident that it was a mere opinion as to the amount of Tan Bark that could be gotten from the timber, and was not such a representation as necessarily to be fraudulent through not

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true and one not calculated to influence the purchaser in his judgment, at least there is no averment that the purchaser had no opportunity to judge as to the quantity and depended on the representations of the seller and that it was a material consideration in making the contract. As has been often decided, the mere expression of opinion of the quantity, quality and value where the purchaser has an opportunity to judge is not to be deemed either an affirmation amounting to a warranty nor a fraudulent representation.

Another allegation is that the vendor represented "that there was nine acres of bearing, grafted fruit trees which would yield many dollars per annum, which was also false." Now whether this is intended to apply to the quantity or quality of the trees, or their annual yield, we cannot tell; an averment of the facts in which the fraudulent representations consisted should have been made.

Another defense as averred is that appellee sold him the farm without reservation,

"representing and holding out as an inducement that there was a good steam boat landing in front of said premises at all stages of water and that fifty cords of wood was on the place ready to be cut and ricked for consumption by steam boats, and that it is false as to the steam boat landing and that plaintiff claimed and did remove the wood from said farm."

If the wood was really cut and corded it was no part of the realty but personalty and was not included in the sale of the farm unless specially so agreed which is not averred.

The averments as to the steam boat landing are general that he represented that it was a good one in all stages of water which it is averred was false, but in what the false representation consists whether it is because in very big water it so spreads over the banks as to render the landing unfit for use, or because the water is so shallow in low water as to render it useless, is not alleged.

So that none of these matters growing out of or connected with the sale and purchase are averred in apt and legal form so as to present either defense, counter claim or set-off.

The slander of the title of appellant by appellee if made out and

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properly set out would be a claim for unliquidated damages which cannot be offset against a claim on contract, but constitutes a cause of action to be enforced by proceedings peculiarly adapted to such. It is in no manner connected with the original cause of action so as to allow it as a counter claim.

As the answer presented no legal cause of defense, the Common Pleas Court correctly refused to set aside the judgment, two days after its rendition by defendant, on the presentation of this answer.

Nor was the motion to set aside the judgment subsequently made because the cause had been transferred from the Circuit to the Common Pleas Court, more availing. The act creating this court fixed the commencement of the first term in September, and directed the clerk to transfer all causes, ordinary, from the Circuit Court to it on the second Monday in August, this public enactment was a public notice to all litigants when and where their suits would be adjudicated, and as binding as if it had directed the Circuit Court at its subsequent term to transfer said causes; a case of peculiar facts and hardship might arise in which a liberal opportunity for a party to present a meritorious defense should be allowed, but this does not fall within that class.

Wherefore the judgment is affirmed with damages.

Walker, and Larue, for appellant.

Coale & Fairleigh, for appellee.

W. L. PAYNTER v. C. E. BALLENGER ET AL.

Vendor and Purchaser—Perfect Title.

The vendor has a right to expect, and require a perfect legal title before he shall be required to pay the last installment of the consideration.

APPEAL FROM BARREN CIRCUIT COURT.

October 7, 1868.

OPINION OF THE COURT BY JUDGE ROBERTSON:

The appellant certainly has a right to expect and require an assurance of a perfect legal title before he shall be compelled to pay the last installment of the consideration. Denying that such a title can be made to him, he requires an exhibition of the evidence of it. But the evidence produced fails to show, with satisfactory certainty, an assuring title to a large portion of the land. A cloud still hangs over that portion called "*The West Tract.*" It appears that Thomas West once occupied and claimed it, that, after his death, his widow sold and conveyed it to Delph, without proof of authority to sell more than dower, and witnesses say that his heirs also conveyed to Delph, but there is no documentary proof of it. And one of them, Edward West, long since died, leaving infant children who were not made parties, and against whom time might not availably operate. In some way the title ought to be cleared of these doubts and difficulties.

Wherefore the judgment is reversed and the cause remanded for further proceedings.

Leslie, and Harlan, for appellant.

Smith, for appellee.

W. D. TINSLEY V. STARK FIELDER'S ADMR.

Lands—Unpaid Purchase Money—Collateral Security—Waiver of Lien.

In a conveyance of lands, specifying partial payments, the express reservation of a lien as an indemnity for the payment of one of the notes for unpaid purchase money, and the failure to make a similar provision for the other notes for which specific collateral of personalty was designated, is held to be a waiver of the lien on the estate conveyed as to the notes secured by collateral.

Interest—Installments—Subsisting Debt.

When instalments of interest, which are specified in an obligation, mature, they become subsisting debts then due, with attributes of principal and carry interest as such.

Same—Bills and Notes—Lien.

A purchase money note, carrying specific installments of interest to be paid, being secured by a lien on the land, the accrued interest thereon was an incident secured and protected by all the safeguards which surrounded and secured the principal, and a lien would attach for such interest, though the principal be not due.

May 27, 1868.

APPEAL FROM LOUISVILLE CIRCUIT COURT.

OPINION OF THE COURT BY JUDGE PETERS:

This action was originally brought to recover the unpaid interest due on two notes, executed by appellant to appellee's intestate in part consideration of valuable real estate in the county of Jefferson, conveyed to the former by said intestate. One of the notes is for \$5,000 due six years from the first of February, 1859, with interest payable annually from the last named date, the other for \$30,000 due fifteen years from the 1st of February, 1859, with interest thereon from that day payable annually. Pending the action, the note for \$5,000 matured, and by an amended petition, judgment was sought for the principal, and accrued interest on that note, and the several installments of interest which had accrued in the meantime on the note for \$30,000, and a lien claimed on the real estate conveyed, for the payment of the several demands

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sued for. In appellant's answer he denied that any lien was retained for the security of the smaller note and its interest.

On final hearing, the court below rendered judgment for the annual installments of interest on both notes, the interest on the larger one to commence the 1st of February, 1860, and interest on the installments as they matured, and also for the debt of \$5,000 and for installments of interest beginning from 1st of February, 1859, and with interest from the day it was due, subjecting the land to the payment of the interest on the note for \$30,000, and decided that no lien existed for the other note and interest. From that judgment Tinsley has appealed, and Fielder's administrator prosecutes a cross appeal.

The principles settled by the chancellor in the decree are approved. In the deed to appellant, the grantor recites that

"in consideration of ten thousand dollars (\$10,000) cash in hand, and the note of said Tinsley of this date (10th of January, 1859) for five thousand dollars, payable three years after the first of February, 1859, with interest thereon from that day, which interest is to be paid annually, counting from the said first of February ensuing, and the note of said Tinsley, for the like sum of five thousand dollars, payable six years after the said first of February, with interest thereon from that period, and which interest is to be paid annually, counting as above mentioned, and to secure which sums of \$5,000.00 each, said Tinsley has this day transferred to said Fielder, ten thousand dollars of stock in the Farmers Bank of Kentucky, and which said Fielder is to hold as collateral security, only for the payment of said sums. And also the note of said Tinsley of this date for thirty thousand dollars (\$30,000) payable fifteen years after the said first day of February ensuing, with interest from that time, which interest is to be paid annually, counting from said first of February ensuing, and to secure the payment of which note of thirty thousand dollars, a lien is expressly retained on the tracts hereby conveyed, &c."

While it is expressly stated in the deed, what part of the purchase money is unpaid, as required by the statute in order to retain a lien for the same, still it is also stated that \$10,000 of stock in the Farmers Bank of Kentucky was transferred to Fielder

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by appellant, as collateral security, to secure the two notes of \$5,000 each, and a lien expressly retained on the real estate conveyed to secure the payment of the note for \$30,000. This express reservation of a lien as an indemnity for the payment of the last named note, for which the vendor held no collateral, and the failure to make a similar provision for the smaller notes, for which he held collateral, can be regarded in no other way than as a waiver of his lien on the estate conveyed as to the small notes, and as relying on the collateral security placed in his hands, as his indemnity for their payment.

When the installments for interest matured, they became subsisting debts, then due, with attributes of principal, and carried interest as such.

And the note for the \$30,000 being secured by a lien on the land, the interest which had accrued on that note, was an incident secured, and protected by all the safeguards, which surrounded and secured the principal, and in adjudging a lien therefor the chancellor properly ruled the law.

But it is insisted that even if the principle of the decree is correct, it is nevertheless erroneous, in the amounts adjudged to appellee.

In the petition it is alleged, after a specific description of the two notes for \$5,000 each, that the first named of said notes had been paid, and the interest on the other two, that is, the one for \$5,000 and the one for \$30,000, had been paid up to the 1st of February, 1862, and the endorsements on the notes show that the interest on each had been paid up to the last named date. And yet judgment is rendered for interest on the smaller note commencing from the 1st of February, 1859, and on the larger one commencing the 1st of February, 1860. And the question arising on that state of facts is, whether that is an error available for reversal in this court, before a motion had been made in the court below to correct it?

In *Dodds vs. Combs, &c.*, 3 Met. 28, the 577th section of the Civil Code, was expounded by this court, and the court said:

"Inasmuch as the petition here discloses the payment of the sum not credited, there was enough in the record to authorize the circuit court to treat the omission as a clerical misprision, and order its amendment at a subsequent term;"

and the court affirmed the judgment.

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In this case the payments are distinctly alleged in the petition, and the notes filed with the credits endorsed; the omission, therefore, to enter the credits, or the error in the time when the interest should have been computed, is a clerical misprision, and as it does not appear that an application has been made in the court below to correct the error, this court cannot interpose. If upon such motion being made to that court, and it should refuse to make the correction, the error would then be available for reversal.

Judgment affirmed on original and cross appeal.

Brown, for appellant.

Bunch & Thompson, for appellee.

NELSON FIELD v. G. W. PASCAL ET AL.**Landmarks—Boundaries—Establishment by Long Recognition—Lands and Conveyances.**

Where the original owners of lands recognize a specific line or landmark in conveyances, as a boundary, and their vendees for more than twenty-five years afterwards, accepted and used such recognition, such a boundary will not be disturbed. Such boundary will not be effected by a junior conveyance, attempting to go beyond the line, a prior conveyance having included the land in the junior one, down to the boundary in controversy.

May 29, 1868.

APPEAL FROM FULTON CIRCUIT COURT.**OPINION OF THE COURT BY JUDGE WILLIAMS:**

This controversy is as to the boundary between sections 29 and 32, running east and west, of Township 1, Range 2 west, in Fulton county.

There is a question as to granting a new trial, rather setting aside a judgment, at a subsequent term on a petition without process, but as the real party in interest, and the one to be affected by the judgment, was not before the court when it was rendered

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and would not really be concluded by it, because as to him it must be regarded as a nullity, the question is of no practical importance.

If this case was to be controlled solely by the original boundaries of the sectionizers, the probabilities are that both parties are in error.

The county was sectionized by the running of lines one mile apart, North and South, and making the half mile and mile corner, or putting up stakes, through each township of six miles square. Therefore the South and North boundaries of the section were not ran and marked by the original surveyors, but they were left to be ascertained by the corners fixed in the East and West parallel lines, made by running North and South through the township; hence there were many inaccuracies, mistakes and oversights in the original sectionizing.

It is evident from the report, survey and diagram of F. M. Ray, made in this case, that there is great irregularity in the size of the sections, as now recognized, beginning on the State line running North, on the Eastern parallel line of these sections, 32 being only 253 2-5 poles, whilst 29 immediately north of it is 336 poles, and 20 still north of it is 339 poles broad. And this too in the absence of any very satisfactory evidence of where the original corners stood, save the Northeast corner of section 20 at S on the diagram.

But this case, as we conceive it, is not to be controlled at this late date by the real status of the original corners, as we will proceed to show.

Ben Con, as early as January 17, 1832, obtained title from N. H. Buckley to 505 acres of section 29, and being the whole of it except what Craig owned in the northwest corner thereof. Whilst some of the boundaries are given in this deed, it is evident that but parts of its lines had been surveyed.

Some time during Wm. Cochran's life, and most probably at the time he bought this land of Buckley, as this is the only transaction mentioned in the record between them, Con agreed with Buckley to make Cochran a quit claim to 40 acres of this land "*on the North of said Cochran's land,*" as appears from the recitals of Con's deed to Cochran's heirs of August 4, 1836. Wm. Cochran then owned the Northeast quarter of section 32, but died before the date of said deed.

Nelson Field, M. L. Henning, Burrell Phillips and Cochran's heirs being the owners of the respective quarters of section 32,

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had it surveyed in June, 1834, by Stephen Ray, the deputy county surveyor, and their respective tracts designated by marked boundaries. Ray then at their instance and for them divided the section into four equal parts of 142 acres each, as appears from his plat and report.

This plat and report shows that he fixed the Northeast corner of said section 251 poles from the State line, and the proof clearly establishes that it was the three post oaks, corner, designated on F. M. Ray's diagram, but a few rods from the asserted Maple corner, and that he then ran and marked the northern boundary of the section to the Red Oak corner marked F in the last named diagram, which he fixed as the northwest corner of the section.

The line established by him from the three post oaks, as the northeast corner of the section, south to the State line was doubtless east of the true line, but, Ben Con, Nelson Field and Joshua Smith being the parties most seriously affected entered into a written compromise dated June 18, 1834, by which said corner and line was to stand and the parties injuriously affected were paid an agreed consideration.

The boundaries were thus ascertained by actual survey, and marked lines made designating not only the boundaries of the section but of each quarter, when Ben Con in 1836 made a special warranty deed to Cochran's heirs to the 40 acres immediately in the southeast corner of section 29, reciting the Maple as the beginning corner, and setting out the boundaries. Cochran's heirs it may reasonably be presumed entered into some kind of division previous to November 12, 1855, for December 5, 1854, E. A. Craig, O. A. Cochran and S. J. Cochran deeded to Elizabeth Plummer the 40 acres deeded by Ben Con to Cochran's heirs reciting the Maple as the beginning corner and giving the boundaries as in Con's deed.

And November 12, 1855, Orlando Cochran deeded to B. F. Con the east half of said northeast quarter of section 32, reciting that it contained "*by survey and calculation 80 acres more or less,*" and this is its only description of boundary. No objection seems ever to have been made to these several conveyances.

February 6, 1855, Elizabeth Plummer conveyed said 40 acres to Martha A. Connelly and Susan D. Plummer, and the appellee Pascal, claims to be their vendee by title bond previous to bringing this suit in the year 1860.

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In the year 1834, the owners of section 32 caused it to be surveyed and divided between them by Stephen Ray as deputy for J. W. Gibson the county surveyor and doubtless the lines were then marked though his certificate and diagram of survey, and evidence in the record throws but little light on the subject, as he only gives courses and distances without designating objects as corners or boundaries; but the great weight of evidence establishes that the three post oaks designated in F. M. Ray's diagram, who made a survey under order of court herein, was then established by compromise between the owners of section 32 and Ben Con who owned the adjoining land in section 33, as the corner to said sections. Whether Stephen Ray ran thence by the Maple corner some small distance west of the three post oaks and on the said lines upon which corners are marked or on the dotted line to the red oak as the northwest corner of section 32, as designated on F. M. Ray's diagram, is somewhat uncertain; still M. L. Hening who owned one of the quarters of section 32, states that the line was so run, and Linder proves that Wm. Cochran who owned the northeast quarter of said section recognized said Maple as a boundary.

Ben Con in his deed to Cochran's heirs makes the Con Maple a boundary, and Cochran's heirs in their deed to Elizabeth Plummer also make it a boundary, and Orlando Cochran is a vendor in this deed which is prior in date to his deed to B. F. Con. So that the weight of evidence, the deeds and acts of the parties tends to establish the Maple as a boundary, and it being so established, whether as a corner or line tree, matters but little in this controversy, for its establishment as either, fixes the line from it to the Red Oak being the Northwest corner of the section as the true line.

As W. Cochran, deceased, really was the owner of both sides of the line at the Maple when Stephen Ray surveyed the land in 1834, and recognizing it as a boundary and his heirs subsequently acting on this same recognition and by their first deed in selling the 40 acres designating it as a boundary, their subsequent vendees are bound thereby however erroneous it may originally have been, for after more than 25 years recognition and acting on it as a boundary and rights of vendees having accrued and attached on account of such recognition, and especially as those who then owned both sides of the disputed line sold and deeded up to it as a boundary, it is too late now to disturb it and especially cannot a

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prior conveyance be so disturbed by a junior one, for at the time Orlando Cochran conveyed to B. F. Con, had he attempted in direct language to go north of said Maple, both he and Con would have been estopped from so doing by his deed to Elizabeth Plummer under whom Pascal holds, but no boundaries are designated in his deed to Con further than is implied in the expression that it contains 80 acres by "survey and calculation."

It is also proven that Field after his purchase, by the consent of Mrs. Plummer, joined his fence to hers in order to protect his then growing crop, with an express promise to build a fence in the autumn on his own land, so as to separate their enclosures.

B. F. Con could only get O. A. Cochran's rights whatever they were, by his deed and Field could only succeed to B. F. Con's rights. O. A. Cochran being one of the vendees to Mrs. Plummer and selling all north of the Maple and designating it as a boundary before he sold to B. F. Con, had nothing to convey to him north thereof had he attempted to do so.

It seems to us therefore that the judgment is right, and it is therefore affirmed.

Bramlette & Son, for appellant.

Rodman & Bradley, for appellees.

JESSE RUSSELL v. J. S. GOLLADY.**New Trial—Misconduct of Jury—Evidence.**

Jurors are not permitted to testify as to any misconduct of themselves, or their fellow-jurors, nor as to what influenced them in making up their verdict. It is against the policy of the law to allow such evidence.

October 20, 1868.

APPEAL FROM TODD CIRCUIT COURT.**OPINION OF THE COURT BY JUDGE PETERS:**

Henwood, who was introduced as a witness for the appellee,

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proves he was engaged in the business of inspecting tobacco in the city of New York, and was a member of the firm of the house of Jarvis & Co., of said city, that the tobacco which is the subject of this litigation was taken to their business house for inspection and inspected by him, the competency of his evidence cannot be legally questioned. He also proves that after inspecting it he sent samples of the tobacco from each hogshead to the house of Cordogo & Co. to whom said hogsheads were consigned, and he identifies the tobacco, and the other witnesses testify to *facts* pertinent to the issue, and their evidence was therefore competent and without any technical or legal objection, and the exceptions to the depositions were properly overruled, and their evidence is confirmatory of his.

The jurors themselves are not permitted to testify as to any misconduct of themselves, or their fellow-jurors, nor as to what influenced them in making up their verdict. It is against the policy of the law to allow such evidence. Motions for new trials on such grounds would be vexatiously multiplied, and jury trials discredited by the affidavits of jurors presented to stullify their own verdicts. *Luttrell vs. Maysville and Lexington Railroad*, 18 B. Mon. 291. The only two grounds relied upon for reversal, are that the court erred in overruling exceptions to depositions and that the jurors or some of them did not comprehend the effect of some instruction of the court. But the instructions are not incorporated in the bill of exceptions, and this court is not informed as to them and must presume they were proper. As therefore the record presents no perceivable or available error, the judgment is affirmed.

Kennady, Petrie, for appellant.

James, for appellee.

LEE WHITAKER ET AL., v. BLAIN MOOREMAN & Co.

Attachment—Successful Claimant—Costs.

In an attachment suit, where a claimant is successful in sustaining his claim to part of the property, it is error to adjudge the costs of the suit against him, though the attachment be sustained in all other particulars.

APPEAL FROM M'LEAN CIRCUIT COURT.

October 19, 1868.

OPINION OF THE COURT BY JUDGE PETERS:

Conceding that there is some evidence that Lee Whitaker paid for the stock, cattle and sheep, on which the attachment was levied, still the evidence fails to show that there was any open, visible change of possession, and that a change of possession accompanied the sale. The son who was living several miles from the father about the time without any explained, or appreciable reason changed his residence, and removed to the father's, and the asserted purchase was made there, the property remaining where it was before and at the time of the alleged sale, and it appears that the crop of tobacco raised on the father's land was sold and the money received by the son, and the proceeds not *satisfactorily* accounted for.

We concur therefore with the court below in sustaining the attachment of appellees as to all the property except the buggy and cart claimed by appellant, but as he was successful in asserting his claim to the last named articles it was erroneous to adjudge costs against him.

Wherefore the judgment awarding costs against Lee Whitaker in favor of appellees is *reversed*, and the cause remanded with directions that each party in Lee Whittaker's petition pay his own costs, and the judgment as to all other matters is affirmed.

Owen, Bickers, for appellant.

Tanner & Boyd, for appellees.

M. OANPELT v. BLOUNT HODGE.

Attachment—Grounds for—Bill of Sale—Fraudulent Intent to Prefer Creditors

M. Oanpelt, having agreed to mortgage certain property to Hodge, his creditor, as collateral security, shortly thereafter by bill of sale, transferred all his property to one Kuglar, but possession not actually having been delivered. This was done in seeming contemplation of the removal from the State of said Oanpelt before the expiration of his lease from Hodge. Held to be sufficient to sustain an attachment by the creditor, Hodge.

APPEAL FROM LIVINGSTON CIRCUIT COURT.

April 26, 1868.

OPINION OF THE COURT BY JUDGE ROBERTSON:

As the decision of this case depends on a multitude of facts respecting which the testimony is apparently conflicting, a detail and analysis of the evidence are deemed useless in this opinion.

We shall therefore content ourselves with the following judicial conclusions:

1. The bill of sale to Kuglar was intended to protect the property ostensibly transferred by it from the appellee's demand.

2. That bill of sale being made after the agreement to mortgage the sale property to the appellee as collateral security, and the possession moreover being inconsistently retained by Oanpelt, must be deemed fraudulent as against the appellee.

3. The evidence authorized the deduction that the Oanpelt secretly contemplated a removal from the State before the expiration of the lease, and were selling property and trying to borrow money preparatory to that removal and for evading the payment of the debt to the appellee and, without payment, thus avoiding all liability on the lease.

Wherefore this court adjudges, as the circuit court did, that the attachment was sustained by the proof. And consequently the judgment is affirmed.

Husbands, Bush & Bush, Lindsey, for appellant.

Bennett, for appellee.

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WATSON ET AL. v. AVEY ET AL.

Mandate of Appellate Court—Duty of Judge of Lower Court to Obey.

It is not discretionary with a Judge of the lower Court to enter the mandate of the Court of Appeals. When such a mandate, accompanied with a motion for judgment, is presented, same must be entered, and final judgment given.

Supplemental Pleadings—Mandate of Appellate Court—Relief from on Grounds Not Litigated—Judgment.

After the mandate of the Appellate Court shall have been entered and final judgment rendered by the trial judge in the Court below, said judgment may be stayed by supplementary pleadings if the grounds for relief show in the allegations, matters not litigated. But the Court cannot allow such proceedings to be begun before the mandate shall be entered or accept such pleadings in lieu thereof.

APPEAL FROM JEFFERSON CIRCUIT COURT, CHY. DIV.

June 26, 1868.

OPINION OF THE COURT BY JUDGE PETERS:

On motion.

The only question, it seems to me, which can arise upon this proceeding is, do the reasons set forth in the response of the chancellor, justify him, in refusing to enter a final judgment in the case named, carrying out the mandate of this Court?

It was his duty, when the opinion, and mandate of this Court were presented, in the Louisville Chancery Court, accompanied with a motion for a judgment, to enter them, to proceed, in a reasonable time, to enter a final judgment to carry out the orders, and mandate of this Court.

And then if appellees should by sufficient allegations, in an original, or supplementary pleading, show themselves entitled to relief, for reasons, and upon grounds not litigated, and concluded in the proceedings and adjudications in the previous case, it would be proper for the chancellor to make such preliminary orders, and grant such relief as they might show themselves entitled to.

In addition to the implied constitutional power, the Legislature

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has, by an express enactment, conferred full power on this court to compel an enforcement of its mandates by inferior courts, and if it fails in this duty, the right of appeal is valueless, and the court a useless expense to the State. Section 902 Civ. C.

My opinion therefore, is, that an order be made requiring the chancellor to enter the opinion, and mandate in this case, and that the same be carried out according to their true intent, and meaning.

(See original opinion 2. Bush.

Bullitt, Caldwell, for appellant.

Harlan, for appellee.

G. T. ISBELL ET AL. v. THE BANK OF LOUISVILLE.

Bill of Exchange—Endorsers—Action on Without Proof of Dishonor.

In the absence of allegation in a petition on a bill of exchange, of notice of dishonor no action can be maintained against the endorsers, where no proof of notice of dishonor is shown.

APPEAL FROM RUSSELL CIRCUIT COURT.

June 12, 1868.

This is an action to recover on a bill of exchange drawn by Isbell in favor of J. S. Stockton to give credit to Leveridge who sold them to the bank for their full value and Leveridge made default and failed to take up the bill when due. The amount of the bill was \$2,070.74 and on the back of the bill was several endorsers.

The Bank secured a default judgment against Isbell, &c., in the lower court and Isbell appealed.

OPINION OF THE COURT BY JUDGE ROBERTSON:

There being neither allegation nor proof of notice of dishonor, the judgment is erroneous as to all the defendants except Leveridge in his own right, who accepted for his own benefit. Wherefore the

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judgment, except as to Sunny, is reversed and the cause remanded for further proceedings.

Isbell, Buckner, for appellant.

James, for appellee.

JAMES M. O'REAR v. N. P. TIPTON.

New Trial—Newly Discovered Evidence.

Newly discovered evidence to constitute grounds for a new trial, must be such as was not within the knowledge of a defendant at the trial in the court below. And the affidavits must show conclusively that the defendant did not know of the existence of the newly discovered evidence at the time of the trial and that it would have been impossible for him to have used same.

APPEAL FROM MONTGOMERY CIRCUIT COURT.

July 2, 1867.

OPINION OF THE COURT BY JUDGE WILLIAMS:

The only cause assigned for a new trial was the discovery of evidence after the trial.

That the defendant was not surprised at the statement of James Tipton is evident from the fact that he had one witness, McCormick, to contradict him or rather to prove that the witness Tipton was not present at the time he located the conversation with O'Rear, in which the latter acknowledged that Adams had sent the money to N. P. Tipton by the defendant. The new evidence discovered, so far as the affiant Foster is concerned, only goes to corroborate McCormick and is really nothing new, and there is nothing in any of the affidavits to show that O'Rear did not know that Foster was present at the time spoken of by McCormick but the contrary is to be inferred, therefore it was negligence in O'Rear not to enquire of him what he knew and have him summoned if he desired the evidence.

The affiant Everett speaks of a conversation between James

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Tipton and O'Rear at a different time and place, of course O'Rear knew of this conversation, and we must presume, in the absence of any contrary statement in his affidavit, knew who were present, besides, this could only be used in contradiction, for it could in no sense bar N. P. Tipton from recovery.

Everett also says he heard a conversation between O'Rear and N. P. Tipton, but there is nothing in either affidavit to show that O'Rear did not know that the affiant was present at both conversations and it is to be presumed he did know of his presence and his failure to have him summoned was laches.

Having risked a trial on the evidence of McCormick we see nothing to justify a new trial after an adverse judgment.

Wherefore the judgment is affirmed.

JOHN G. TAYLOR v. JOHN FARLEY.

Costs—Plaintiff Entitled to His Costs When Petition Corrects Errors.

Where in a petition by the plaintiff he succeeds in correcting mistakes charged therein, he is entitled to recover his costs, though the petition may not be sustained and relief granted as prayed for.

APPEAL FROM GARRARD CIRCUIT COURT.

June 11, 1868.

OPINION OF THE COURT BY JUDGE ROBERTSON:

We are satisfied that when the partnership was dissolved, the parties made a settlement including all accounts between them, except uncollected debts and some personal articles, and that those debts and articles have been satisfactorily adjusted *pendente lite*.

And we are unable to see that there was any essential mistake in the settlement which has not been corrected by the decree appealed from. The first judgment for \$100 in appellant's favor for mistake against him, was afterwards properly corrected and reduced to \$50; and the appellant, having gotten the \$50, is not entitled to more than one half of the rent for 1848 adjudged to him as erroneously charged in the books kept by the appellee.

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Wherefore, perceiving no essential error in the judgment on the partnership accounts we affirm it.

But, as the appellant succeeded in correcting mistakes charged in his petition, it seems to us he was entitled to a judgment for his costs, and that in adjudging that he should pay his own costs the Circuit Court erred; and that judgment is therefore reversed and the cause remanded for correction of it. But as each party has partially succeeded on the appeal there will be no judgment for costs in this court.

Turner, for appellant. . .

Breck, for appellee.

J. W. MCPHERSON v. H. A. TUCKER ET AL.**Brokers—Duty to Protect Interest of Client—Actions Against.**

Where a firm of brokers, acting on the request of their client, to replace a purchase made for him on a prior transaction, buys the commodity at the price at which it had been previously sold to protect the interest of the client, he cannot be heard to complain of a loss to him sustained thereby, although he may have repudiated the second purchase, on the day it was made.

APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

June 9, 1868.

OPINION OF THE COURT BY JUDGE WILLIAMS:

Appellant sued appellees for \$805.05, and alleged loss on gold, which he insists they improperly charged to him.

Defendants acknowledged an indebtedness to him of \$120.46, and the jury having found a verdict for this sum only, and the court having refused to disturb the finding, and rendering judgment thereon, he prosecuted this appeal to reverse it.

Previous to March 22, 1865, appellant had deposited with appellees \$1,000 in currency as margin and upon which they had purchased for him \$5,000 in gold, at 215 3-4, premium.

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March 10, 1865, McPherson wrote to Tucker & Co., that he supposed his margin of \$1,000 was exhausted, and that A. O. & J. S. Branin, as agents for O. R. King & Co., held in Louisville \$2,500, actual gold, for him, and with whom he was doing his tobacco business, and that he supposed this would be a satisfactory basis, but if not, that Messrs. King & Co. on that basis would deposit the requested amount of currency to still hold his \$5,000 gold.

This letter was answered by Tucker & Co. March 22, 1865, in which they say gold is about 150 and that they had telegraphed Messrs. Branins to remit the \$2,500 of gold, and in which they say "we will hold the gold as requested until you wish to sell."

Two days thereafter, however, without further advice from McPherson, but under the advice of Mr. A. O. Branin, who was acting as McPherson's agent, though engaged in some capacity in Tucker & Co. house, they sold the \$5,000 of gold at 148 1-2 and advised him of the sale under same date.

Although McPherson's response of March 31st to Tucker & Co.'s letter of March 24th is not in evidence, yet it is evident from theirs to him of April 8th, that it had been received and that he complained of the sale having been made.

In this letter Tucker & Co. enter into an explanation of the reasons which prompted the sale, and which was mainly to protect his interest, and informed him that King & Co. was unwilling to release their lien upon the \$2,500 gold in Messrs. Branins hands. In this they state the balance due them of \$2,512.08, and propose to restore his \$5,000 gold sold at the same figures, "*if the sale is not satisfactory and you will advise us by return mail.*" April 15th McPherson responded, saying "*I will take back the \$5000 gold sold by you for me at same rates 148 1-2 and please hold until you hear from me directing a sale.*" April 19th, McPherson wrote to Mr. A. O. Branin somewhat in a spirit of complaint against King & Co. for their "tenacity in holding on" to their lien on the \$2,500 gold, and also alludes to the letter offering to restore the \$5,000 gold sold and professes to be satisfied as to the sale, alluding also to his letter of 15th last directing its restoration. And although he does not define Dr. Whitlock's interest in this \$2,500 gold, yet he alludes to it, by way of showing he would do "nothing knowingly to affect injuriously the interest of Dr. Whitlock."

April 25th, Messrs. King & Co. wrote to McPherson, in which they propose to him to "induce Dr. W. to write us to release your gold margin and charge any deficiency in the gold account of Whitlock & McPherson to his account, or that he write to us in the name of W. & McP. for us to pay Tucker the balance you owe them." They go on to say that \$2,473.50 gold, really but \$2,374.50 when they come to open the bag and count it, had been placed to the credit of Whitlock & McPherson, and this is the same alluded to as being \$2,500 in hands of the Messrs. Branins.

Although Dr. Whitlock's letter to Mr. A. O. Branin releasing this gold is not in the record, yet it is alluded to in the letter of May 10th, by Messrs. King & Co. to McPherson, in which they say, "*on 3 May Mr. Brannin presented Dr. Whitlock's letter of 19 April authorizing the release of your gold ... * .. * .. it was paid over to H. A. Tucker & Co.*"

May 3, Messrs. Tucker & Co. wrote to McPherson acknowledging the reception of his of 19 inst. (should be April) to Mr. Branin, and say "*we hand you settlement of account showing we had replaced your five thousand gold at 148 1-2.*" On that very day McPherson wrote to Tucker & Co. declining to have the \$5,000 of gold purchased for him. This gold was afterwards sold at 136 and produced the loss in controversy. Tucker & Co. did business in New York, whence all their correspondence. McPherson corresponded from Hopkinsville, Kentucky, letters by ordinary course of mails from one of these points to the other were from four to five days in passing. McPherson's correspondence about the same matter being with these different parties, to-wit: Tucker & Co., A. O. Branin and King & Co., makes it quite complicated, but with this chronological order of facts the question is greatly simplified.

When Tucker & Co. first proposed to restore to him the \$5,000 gold sold at 148 1-2, they expected him to place with them a sufficient margin to cover possible losses, including his arrearage, and that margin must be so placed was understood by McPherson as is evident from his letters, but he supposed the \$2,500 actual gold in Messrs. Branins hands would suffice, but King & Co. had a lien upon it, which they would not release until Dr. Whitlock's letter of April 19, 1865, sent by McPherson to Branin, and which was presented to them May 3, authorized it. Tucker & Co. bought the \$5,000 gold on McPherson's account the same day, and notified him by letter, and though McPherson wrote the same day declining

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the purchase, yet this could not reach Tucker & Co. for four or five days. Tucker & Co. made the purchase so soon as King & Co. released the gold ordered by McPherson to be placed in their hands.

Although unfortunate, and to say the least of it, a speculation more infatuating than legitimate, and pregnant of greatly more evil than good, yet there is nothing in this case to manifest bad faith on the part of Tucker & Co. There was a small gold balance of seventy odd dollars due appellant which appellees accounted for in currency at the market rates, and for which he has judgment, and for which under the decision of this court he can coerce gold; therefore it does him no wrong.

Judgment affirmed.

Bullock & Anderson, for appellant.

Cochran & Thompson, for appellees.

BERRY EATON v. THOS. S. SANDERS.**Arbitration and Award—Affirmance or Decision by Circuit Court.**

An award made by arbitrators, not named by the Court but to be chosen by the parties litigant, is valid and binding, where the record shows who were chosen arbitrators, that they were all sworn, that the award was made and signed by one of them and the umpire, and that copies were furnished to each party, and where the parties, with their witnesses and counsel appeared before the board on the day set for the hearing, and all fully heard.

APPEAL FROM EDMONSON CIRCUIT COURT.

June 26, 1868.

OPINION OF THE COURT BY JUDGE ROBERTSON:

While it might be doubtful whether the horse sued for was, by capture by the victorious Federal force, a spoil of the General Government or was the property of the finder until the true owner came, yet the sabre found on the field of battle must be presumed to have been taken by conquest.

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But, however all this may be, the award cleared this litigation.

The submission to arbitrators not named but to be chosen by the parties was valid and binding; and the record shows who were chosen arbitrators and umpire; that they were all sworn; that the award was made and signed by one of the arbitrators and the umpire, and that copies of it were furnished to each party.

The submission also fixed the day for the setting of the arbitrators, and the record also shows that the parties postponed it to another day and then appeared before the arbitrators with their witness and counsel, and were fully heard. The award therefore appears to have been regular and legal. And was properly made the judgment of the court.

Wherefore the judgment must be and is affirmed.

Scott, for appellant.

HAHN v. DORA.**Contracts—Variance Between That Proved and That Alleged.**

The allegations in a petition were that corn was to be delivered at the Government warehouse in the city of Louisville or at defendant's place of business, and in the amended petition that it was to be delivered "at defendant's or at the Government warehouse or at his place of business," and the proof showed the corn was to be delivered at the "Government stables or at defendant's warehouse." The petition also alleged that the corn was to be "paid for as delivered by the wagon load," of which latter there was no proof that the Government warehouse and Government stables were the same place, nor any evidence that the defendant's warehouse was his place of business. **Held**, to be a variance between the contract alleged and the contract proved.

Contract—Valid Delivery of Article Sold Under—What constitutes Tender.

Under a contract for the sale of corn, to be delivered at the city of Louisville at a designated place, a tender to the defendant while the corn was partly on loaded cars in transit and partly in the City of Jeffersonville, Ind., and in quantities, at variance with the designated amounts to be delivered under the terms of the contract, would not be sufficient to hold the defendant liable for any loss the plaintiff would sustain in consequence of a sale at a less figure than that specified in the contract. The defendant was not bound to receive the corn thus offered, as a compliance with the contract.

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APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

June 26, 1866.

OPINION OF THE COURT BY JUDGE MARSHALL:

This action was brought by Dora upon an alleged contract for sale to Hahn of 5,000 bushels of corn, viz: 2,000 bushels of shelled corn and 3,000 bushels of corn in the ear, at the price of \$1.25 per bushel, the weight of the bushel of each kind of corn being fixed, the corn to be delivered in reasonable time; the place of delivery in Louisville being specified. The plaintiff alleges that he had heretofore delivered to the defendant in Louisville 2,400 bushels of corn, of which 1884 bushels were shelled, and 356 in the ear, for which defendant had paid him; and that he had the remainder ready to deliver to him at Louisville, and had offered and tendered it to him, but that he had refused to receive it; that the corn was deteriorating, and he would be compelled to sell it for 90 cents per bushel, and he claims \$966 as the amount of his loss. The defendant in answer denies that there was any such contract of sale and purchase, and denies all other material allegations of the petition.

The jury without instructions from the court found for the plaintiff \$966 in damages, for which a judgment was rendered; and the defendant's motion for a new trial on the ground that the verdict was against the evidence and against the law having been overruled, he has appealed from the judgment.

It is now objected, first, that there is a variance between the contract proved and the contract alleged; second, that there is no evidence of a sufficient offer to deliver, and, third, that the plaintiff's evidence shows that he did not offer the proper quantities of corn in ear and of shelled corn to make the proper quantities of each which according to his evidence remained to be delivered.

1. The contract alleged in the original petition was, that the corn was to be delivered at the Government warehouse in the city (of Louisville) or at defendant's place of business—as stated in the amendment made during the trial; it was to be delivered “at his (defendant's) or the Government warehouse, or at his place of business;” the contract proved was that the corn was to be deliv-

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ered at the "Government stables, or at defendant's warehouse," and there is no proof that the Government stables and the Government warehouse were the same place. The petition also alleges that by the contract the corn was to be "paid for as delivered by the wagon load," of which there is no evidence whatever. Nor is there any evidence that the defendant's warehouse was his place of business, and this is impliedly negated by the amendment.

There seems therefore to be a variance between the contract alleged and the contract proved.

2. The offer to deliver, though made at the defendant's place of business, was made when the corn was not even in the city of Louisville, but was on the opposite of the river, some indefinite part in cars on the way to Jeffersonville, and the rest in Jeffersonville, and the offer was not to deliver at any particular place in Louisville. If such an offer made under such circumstances should be deemed a sufficient tender to throw the loss upon the vendee, there was such a discrepancy with respect to the sort of corn to be delivered and that offered as rendered the offer insufficient, which will now be shown.

3. After the former delivery of a portion of the 5,000 bushels of corn and the payment therefor as alleged in the petition, there remained to be delivered of shelled corn 116 bushels and of corn in the ear 2,644 bushels. The proof is that plaintiff's agent offered to deliver to defendant in the city of Louisville 2760 bushels of corn, 156 bushels of shelled corn and the balance in the ear. In this offer there was offered an excess of 40 bushels in the quantity of shelled corn, and deficiency of 40 bushels in the corn in the ear, and for all that appears the defendant was not bound to receive the corn thus offered as a compliance with the contract on the part of the plaintiff.

We are of opinion, therefore, that upon the grounds filed a new trial should have been granted.

Wherefore, the judgment is reversed, and the cause remanded for a new trial in conformity with this opinion.

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CASPER GLACKMAN v. COMMONWEALTH.

Disorderly House—Indictment for Permitting—Objection to Instructions—Words and Phrases.

A defendant was indicted for permitting the keeping of a disorderly house on premises owned by him, and an instruction, at the trial, was that "if the defendant did then and there in any house, or any premises in his possession or under his control, suffer any men and women, etc.," to which an objection was made in that by use of the word "suffer" the jury were misled, as the defendant could not be punished for disorders committed unless in his house or on his premises with his knowledge and by his permission. Held, that the use of the word "suffer" was in place of "permit" or "consent," and implies in the connection in which it is used a knowledge of improper conduct of those who met at his house or on his premises and an acquiescence in the same, and therefore not misleading to the jury.

Criminal Code—New Trial—Refusal to Grant.

Under Section 349, Criminal Code, it is provided that an error in granting or refusing a new trial shall not be cause for reversal. Under these provisions it is obvious that the sufficiency of the evidence to sustain a charge in an indictment, cannot be enquired into by the Appellate Court, nor the judgment reversed on that ground.

APPEAL FROM PENDLETON CIRCUIT COURT.

June 2, 1868.

OPINION OF THE COURT BY JUDGE PETERS:

Three grounds are relied upon here for reversal, First, that appellant's demurrer to the indictment should have been sustained.

That is an error, even if it be one, for which this court cannot reverse the judgment.

By sub-section 2 Section 349 Civil Code, it is provided that an error in not setting aside an indictment, or in overruling a demurrer thereto, shall not be sufficient to reverse a judgment.

The second objection is that the court below erred in the instructions given to the jury, and more particularly in the first instruction, in which the jury was told that if the defendant did then and there in any house, or any premises in his possession or under his control "*suffer*" any men and women, &c., stress being put on the

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word suffer in the objection, in which it is insisted that by the use of that word the jury not only might be, but was most probably misled, as the defendant could not be properly punished unless the disorders complained of were committed in his house, or on his premises with his knowledge and by his permission. The word is used in the instruction in the place of, and for the word "*permit*" or consent, and implies in the connection in which it is used a knowledge of the improper conduct of those men and women who met at his home, or on his premises, and an acquaintance in the same and in that sense the jury must have understood it and consequently it was not misleading.

As to the last objection that the verdict is not sustained by the evidence it is sufficient to remark *that by section 348 Criminal Code* it is provided that the judgment can only be reversed for errors of law apparent on the record prejudicial to the appellant, and by section 349, it is provided that an error in granting or refusing a new trial, shall not be cause of reversal. Under these provisions it is obvious that the sufficiency of the evidence to sustain the charge contained in the indictment, cannot be inquired into by this court, nor the judgment be reversed on that ground. In this case no error was committed in granting instructions, and none seem to have been overruled. Wherefore as the whole case seems to have been submitted to the jury on unobjectional instructions it results that the judgment must be *affirmed*. *Murphy vs. Commonwealth 1 Met., 365.*

C. H. Lee, for appellant.

JAMES A. TURNER v. CYRUS ALLEY.**Attachment—Improper Levy No Defense to Action.**

An improper levy by the sheriff on realty owned by a defendant instead of on his personal property, is no defense to an attachment suit. The remedy of the party aggrieved is against the sheriff for making an improper levy.

APPEAL FROM MORGAN CIRCUIT COURT.

June 26, 1868.

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OPINION OF THE COURT BY JUDGE WILLIAMS:

Alley sued out an attachment against the estate of Turner on a debt due of \$200, which the sheriff levied upon a house and lot in West Liberty.

Judgment went by default upon the debt, but the attachment was continued. At the succeeding term of the court, Turner put in an answer, in which he stated the consideration of the notes to be purchase price for some lots in Morehead, but his defense was that the sheriff levied on realty, when he was the owner of sufficient personalty to satisfy the debt, which must have been known to the plaintiff and the sheriff, but he does not say they really knew of it or where it was, and the fact that he was so acting as to authorize an attachment, which fact he does not controvert, raises the presumption that the sheriff did not know of it, at least he never tendered any personalty in discharge of the levy upon the realty, and his subsequent total insolvency, as shown in the case of other attaching creditors, having exhausted his estate without entire satisfaction of their claims, still fortifies this presumption, but if this were not so, we apprehend his remedy would be against the sheriff for making an improper levy and is no defense to the attachment, which secured a lien upon his personal and real estate. It is not really a defense to the attachment but a complaint as to the levy.

This appeal is by Turner against Alley, therefore no question of priorities as to the other attaching creditors can be considered, nor does Turner in his answer, nor any other paper in the cause set out that Alley had a lien upon the lots in Morehead. Every sale of land does not necessarily retain a lien, or this may be waived afterwards, but even if there was a lien this was no defense to his attachments, perhaps in equity the other attaching creditors could have compelled Alley to first exhaust this lien before resorting to the attached funds but they took no such steps. The court correctly adjudged a sale of the house and lot for Alley's benefit, wherefore the judgment is affirmed without damages, it not having been suspended.

Major & Rodman, for appellee.

AMERICA A. CHANDLER v. D. H. ROWE'S ADMINISTRATOR.**Accounts, Mistakes Corrected by Court of Equity.**

A clause in a memorandum obligation, made in settlement of accounts between parties of "due, etc., if there is no mistake" would secure no right to either party which a Court of Equity would not correct, if either of the parties could show there was a mistake in the settlement prejudicial to the one complaining, in the absence of the words quoted.

Equity—Error in Accounts Stated, Corrected—Duty of Party Alleging Error to Prove It.

Where there is a written agreement showing a settlement of accounts between parties, the onus devolves upon the party alleging mistakes therein, and until they are shown to exist, the writing must prevail, and it is not sufficient to show that the parties had other dealings and various transactions prior to the date of the writing, but it devolves on the one complaining to show that payments made prior thereto, were not settled and were omitted by mistake.

Written Instruments Evidence Against Estate.

A writing, signed by a testator in settlement of an estate for which he was trustee, is evidence of an intention by the parties to adjust the accounts of the trust estate, and a settlement between the parties.

APPEAL FROM BOYLE CIRCUIT COURT.

June 11, 1868.

OPINION OF THE COURT BY JUDGE PETERS:

By a judicial proceeding in the Marion Circuit Court, D. H. Rowe, now deceased, was, about July, 1861, appointed trustee for appellant, Mrs. A. H. Chandler, and executed a bond with appellee A. P. Lee as his surety, for the faithful discharge of his trust. On the 20th day of July, 1861, as appears from a memorandum in the pleadings signed by Rowe, trust funds amounting to \$2,240, came to his hands.

In the summer of July, 1864, Rowe died intestate, and administration of his estate was granted to said A. P. Lee, who filed his

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petition in the Boyle Circuit Court against the heirs, widow and creditors of his intestate for a settlement of the estate.

Mrs. Chandler, being a defendant, filed her answer and cross-petition against the personal representative of intestate and made the Lee the surety of her late trustee, also a defendant, in which she alleges an indebtedness of intestate to her as her trustee in the sum of \$1,963.34, subject to a credit of \$150, paid July 23, 1864, and twenty dollars paid in December, 1864, which indebtedness she alleges to be evidenced by a writing bearing date the 29th of April, 1864, signed by said intestate, which she files with and as a part of her answer; and prays judgment for said sum of \$1,963.34 with interest from the date of the writing aforesaid and her costs, against the personal representative of intestate and Lee as his surety, subject to said credits.

Mrs. Chandler alleged in her cross-petition that the amount claimed by her as due her late trustee, was ascertained by a settlement of their mutual accounts and dealings up to the date of said writing.

Lee in his answer to said cross-petition, admits the appointment of his intestate, trustee for appellant and that he executed the bond with the surety as she alleges, but denies the indebtedness of his intestate to her, says he has no knowledge of any such settlement as charged by her, or of the execution of the writing set up by her, and charges if any such settlement was made, it was obtained by fraud and mistake, or by the fraudulent combination of his intestate and appellant to cheat, and injure him as the surety of intestate, that his intestate paid large sums of money for her, and on her orders, for which he got no credit in said pretended settlement and enumerates quite a number of individuals to whom Rowe paid money, with the sums paid to each and to a further credit for the amount of an account found amongst his papers, after his death, made out by him in pencil, which he files and for which he asks a credit, and also for an allowance for the services of his intestate as trustee as aforesaid.

After the answer to the cross-petition of appellant was filed, the case was referred to the master to audit and state the accounts, and report the result of his investigations.

The master reported the state of the accounts between the parties in four aspects, with varying and widely differing results.

In the first he reports a balance in favor of Mrs. Chandler on the

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1st of January, 1866, of \$1,171.07. In the second the reported balance is only \$96.10. In the third, the indebtedness is stated to be \$1,231.58. And in presenting the fourth, the master states there is a memorandum of a settlement made between Mrs. Chandler and her trustee, of date 29th of April, 1864, referred to in her answer, and filed with the deposition of Mrs. Alice Rowe; taking this as a basis, he makes the balance in her favor up to the 1st of January, 1866, \$1,828.64.

Exceptions were filed to the report, by the parties, and the matters were again referred to the master who reported, taking the first statement of his former report as a basis, the amount in favor of Mrs. Chandler of \$1,088.28. And that if the writing of the 29th of April, 1864 was taken as the basis of the settlement, the result would be as contained in the fourth statement of his former report.

The court below adjudged to Mrs. Chandler one thousand and fifty dollars as the full amount due her on account of said trust and gave judgment for that sum and costs against the estate of said intestate and his surety, and she has appealed.

The paper relied upon by appellant in her cross-pleading as evidencing the amount due her by her late trustee, reads as follows:

“Due Mrs. A. H. Chandler, nineteen hundred and sixty three dollars and thirty-four cents, as trustee on settlement, if there is no mistake. A. P. Lee as my security. Given under my hand this April 29th, 1864. D. H. ROWE.”

Across the words “if there is no mistake” in said writing a pen has been drawn as if to erase them, but they are still legible, as presented in this record, and it is insisted that the instrument should be read with said words remaining just as if they had never been touched, and full effect given to them.

The plea of *non est factum*, is not put into the instrument, nor is it alleged in the answer of appellee that said words were erased by appellant after the writing was signed and delivered to her; but it is deemed not important, and the writing will be considered as if those words stood without a mark upon them. What effect is to be given to the writing thus considered? There is no evidence of fraud or imposition on the part of appellant. The writ-

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ing certainly must be treated as evidence, not only of an intention on the part of the parties thereto to settle and adjust the accounts between them relating to the trust funds in the hands of intestate; but it is evidence that a settlement was made, as expressed in the instrument, and it is conclusive of that fact, if there is no other misake in it. This saving, or *proviso* in the writing, secures no right to the parties which the law does not secure, for it is mutual, and if either of the parties could show there was a mistake in the settlement prejudicial to the one complaining the same would be corrected in a court of equity, in the absence of the words quoted. But the *onus* devolves on the party alleging the mistake to prove it. And until it is shown to exist by the evidence, the writing must control, and it is not sufficient to show that the parties had other dealings, and various transactions prior to the date of said writing; but it devolves on appellee to show that payments made prior thereto were not settled, and were omitted by mistake, otherwise the effect and dignity of the written evidence of contracts and dealings deliberately and solemnly made by the parties, would be reduced to the level of the frail, varying and uncertain memories of individuals. These evils it is the duty of courts to avert, by giving effect to writings fairly and deliberately executed, and treating them as the best evidence of the agreement of the parties, until it is overcome by strong counteracting evidence of mistake or fraud. In this case such evidence is not found in this record.

It is scarcely credible that in a settlement, the intestate would have omitted to bring forward the items of credit, or the greater part of them now claimed as credits, especially as some of them are large compared with the amount of trust fund, if they had not been settled previously, which is forfeited by the fact that other monies of appellant were in the hands of intestate, the principal of the trust fund was reduced several hundred dollars and the interest all consumed.

We cannot concur with the Circuit Judge, wherefore the judgment is reversed, and the cause remanded with directions to refer the case to the master to report the amount due, taking the paper of the 29th of April, 1864, as the basis, allowing appellee credits for all sums paid since that date, and for proceedings consistent herewith.

Bell, and VanWinkle, for appellant.

Durham, for appellees.

SMITH & MURRAY V. JAS. G. SCOTT AND W. L. DESPAIN.

Contracts, Fraud Vitiates—Waiver.

A sold to B a certain quantity of tobacco at sixteen dollars per hundred pounds, under a contract, containing "his crop of tobacco now in the house, raised the present year, also his interest of one-half in some crops of tobacco now on his farm, and several other small crops not yet hauled in but yet already purchased by said Scott and W. L. Despain." Part of the tobacco was delivered under the contract, but A purchased some tobacco of inferior quality and mixed it in with that which was good, this not being of the quality as represented at the time of the contract. Held that this would vitiate the whole contract, except so far as B by subsequent acts, waived it.

Same.

The acceptance by B of a quantity of the mixed tobacco, after inspection in the presence of A, will waive any rights B might have as to misrepresentations made by A.

APPEAL FROM HART CIRCUIT COURT.

February 7, 1868.

OPINION OF THE COURT BY JUDGE WILLIAMS:

Scott having recovered a judgment in equity against appellants for \$824.80 subject to various credits, and Despain having also recovered a judgment against them for \$740.80, subject to certain credits, in consolidated suits, we are asked to revise them.

February 17, 1863, Scott, by written contract, sold to Smith & Nurray at sixteen dollars per 100 bbs, net, Louisville weight.

"his crop of tobacco now in the house, raised the present year, also his interest of one-half in some crops of tobacco now on his farm and several other small crops not yet hauled in but yet already purchased by said Scott and W. L. Despain."

Scott undertook to prize and deliver it in good order at the New Haven depot of the Lebanon branch of Louisville & Nashville

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railroad in a reasonable time after the tobacco should get in proper order. Smith & Murray were to receive the tobacco at New Haven and bear expenses, losses and damage to Louisville, but it was to be delivered at the Pickett warehouse in Louisville and the net weights ascertained there. The tobacco hogsheads were to be marked "R. D. Murray," and Scott's name was also to be placed thereon, for the purpose of distinguishing this from other lots being purchased by Smith & Murray. Some three days thereafter Despain sold his interest to Smith & Murray on the same terms by verbal contract.

Scott delivered at New Haven four hogsheads marked "R. D. Murray," with his own name on them, in March, and these were sold near the close of the month.

Afterwards four hogshead were sent to the Pickett warehouse marked Scott & Co., and Scott or some one for him went to the warehouse, arranged about the freight and drew over three hundred dollars on the tobacco.

This tobacco was sold in June and Smith drew the proceeds remaining due after the payment of freight and advances.

This tobacco was sold at a loss.

Scott and Despain having brought their respective suits, Smith & Murray resisted judgment because, as they assert, the tobacco was not delivered in reasonable time, and that after the date of the contract Scott and Despain bought other and inferior crops at greatly less than \$16 per 100 hundred pounds, and mixed it up with the tobacco sold to them, and hereby practiced a fraud on them and deny that they received the four hogshead marked Scott & Co., but took the remainder of the proceeds to indemnify them for advances made.

There was some contrariety of evidence as to the subsequent purchase of inferior tobacco by Scott & Despain after the sale to Smith & Murray, but before the trial was gone into Murray filed an affidavit saying that they could prove by certain witnesses that the plaintiffs, after the making of said contract, purchased a number of small crops of tobacco, of very inferior quality, at prices considerably below the contract price of \$16 per 100 pounds, which they prize in with the tobacco contracted to the defendants, and that the tobacco previously purchased, but not at Scott's, was of very inferior quality and not such as it was represented to be at the time of the contract, and plaintiffs admitted

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the truth of these statements and went to trial. So the subsequent purchase of inferior tobacco and the mixing it with that sold, which had been purchased by Scott & Despain, which was not then at Scott's, are admitted and not subject to disproof nor further controversy, and this vitiates the whole contract save only so far as Smith & Murray by their subsequent conduct waived it.

The four hogsheads shipped in March and marked as agreed in the contract, being received at the Pickett warehouse, and sold in March, without complaint by Smith & Murray and they controlling the proceeds, must be regarded as a delivery and acceptance, especially as the tobacco was shipped and inspected and was, or could have been seen by Smith who remained at Louisville to superintend the reception and sale of the firm's tobacco.

It is different, however, as to the four hogsheads marked "Scott & Co.," and not R. D. Murray, with Scott's name thereon, as provided in the contract, and especially as Scott took control over this tobacco subsequently to its delivery in the warehouse. The reception by Smith & Murray of the proceeds of this tobacco after deducting the advances to Scott, in ignorance of Scott & Despain having wrongfully bought inferior tobacco and prized in with that they sold to them, should not preclude them as to this tobacco. As to this latter tobacco the court should have adjusted the accounts between these respective parties on the basis of the net proceeds, charging Smith & Murray with only the amount received by them, and on the return of the cause the court will refer the matter to a commissioner to ascertain the amount which Smith & Murray should be charged for the first four hogsheads at the contract price, and what they actually received on the latter four, and adjust up the accounts accordingly.

Where, the judgment is reversed as to both Scott and Despain, with directions for further proceedings as herein indicated.

Murray, for appellants.

Dawson & Rodman, for appellees.

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WELCH JONES ET AL v. F. G. MATHENEY & SON.

Pleading—Bills and Notes—Allegations in Petition.

In a suit on a note, the possession of same by the plaintiff and filing it with the petition, is sufficient to authorize a recovery of the amount due on same, although no distinct averments are made in the petition that the note had been transferred by delivery to plaintiff, together with an affidavit that it was just and due and that he ought to recover the amount of same.

Summons—Constructive Service—Failure to Execute Bond—Appearance in Court of Appeals Cures Defect.

The appearance of a defendant in the Court of Appeals cures a defect of the failure to execute bond in the court below by an appellant in a suit on a note.

APPEAL FROM MERCER CIRCUIT COURT.

February 6, 1868.

OPINION OF THE COURT BY JUDGE PETERS:

The possession of the note executed to McCoun, and the filing it with their petition, although there is not a distinct averment that it was transferred by delivery to appellees by the payee, together with the affidavit that it was just and due them and they ought to recover the amount thereof, would be sufficient to authorize them to recover the amount, and for the omission of the positive averment, that the note was theirs the judgment would not be reversed. But no bond was executed by appellees to appellant, W. Jones, who was constructively summoned, as is required by *Sub-division 2 of section 440 Civil Code*. And it has been repeatedly held by this court that a failure to execute the bond therein required is an error for which the judgment will be reversed, that a reversal in this case is unavoidable on that ground. Notwithstanding this question has been so repeatedly decided by this court, there seems to be a fatal carelessness on the part of plaintiffs in this character of actions, on that point, that warnings, no matter how oft repeated, are powerless to correct.

Wherefore, for failure to execute the bond as by *Sec. Supra* the judgment is reversed, and the cause remanded for further pro-

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ceedings not inconsistent with this opinion. But appellant's appearance in this court is an appearance to the action, and a bond will not be required.

Harlan, for appellant.

J. D. Hardin, for appellee.

JNO. INGRAIN v. BEN PLUMMER'S EXOR.

Ancestors Debts—Liability—Heirs and Distributees.

The defendants are liable, either as heirs, distributees or trustees to pay the debt of their father, they having received from him a sufficiency to satisfy it. As he seems to have distributed all of his estate among his children, it cannot be regarded as an advancement.

APPEAL FROM ROWAN CIRCUIT COURT.

February 4, 1868.

OPINION OF THE COURT BY JUDGE WILLIAMS:

The judgment recites that the record from the Fleming Circuit Court of the original judgment and execution referred to as an exhibit was on file, and as this was subsequently proved to be lost and by order of court was supplied, we are bound to regard the present record.

The evidence established a liability of the defendants either as heirs, distributees or trustees to pay this debt of their father, they having received from him largely over a sufficiency to satisfy it. As he seems to have distributed all his estate among his children, without providing for his debt, it cannot be regarded as an advancement made in good faith according to his and their circumstances.

Judgment affirmed.

Cox, for appellants.

Cord, for appellee.

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JAMES FARRIS AND WIFE V. J. DUNN ET AL.

Pleadings—Amended Cross-Petition, Offer to File.

Allegations of fraud, in a cross-petition, and of the payment of a portion of the mortgage, in litigation, uncontroverted in that there was a mere motion to reject the filing of same, which was sustained, presented a *prima facie* case for relief, and it was error for the court to reject the amended cross-petition as offered.

APPEAL FROM GARRARD CIRCUIT COURT.

February 1, 1868.

OPINION OF THE COURT BY JUDGE PETERS:

Of the various and numerous objections taken to the proceedings and judgment of the court below, such only as seem to be available for reversal will be noticed.

At the August term, 1867, of the Garrard Circuit Court appellants presented, and asked to be permitted to file an amended cross-petition, in which it is distinctly stated, with many other allegations, that the debts to secure which the mortgage to Dunn and others, was executed, were in fact the debts of Wm. A. Hoskins, and that being the case, said Hoskins agreed to, and with said mortgagees to pay off, and satisfy the same, and that he actually did pay to them two thousand dollars of said mortgage debts for which they had given no credit. This amended answer and cross-petition the court below refused to permit appellants to file, to which an exception was taken.

Besides, it is alleged that the mortgage was procured by fraud, and exercise of improper, and undue influence over the mortgagor by the mortgagees or some of them which, with the alleged payment, presented issues that should have been tried and disposed of, and until that was done the collection of the bonds for the purchase of the land, unless it should be made to appear to the court that the obligors therein would be unable to pay them and the securities for their payment would ultimately prove insufficient should be suspended, until the question as to the alleged fraud and payment be adjudicated.

The allegations of fraud, and of the payment of \$2,000 uncon-

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troverted as they were by a mere motion to reject the amended cross petition, presented a *prima facie* case for relief, and the court below should have permitted amended cross petition to be filed, and a reasonable time after the facts presented for appellants to prepare the case under these issues thus tendered for trial.

This court is not prepared to decide that the mortgagees should be compelled to credit the debt with the value of the slaves mortgaged, at the maturity of the debt, or forfeiture of the mortgage. Nor should they be required to suspend the collection of the sale bonds until the litigation on the subject of the *validity of the will of Wm. Hoskins* shall be terminated, if that litigation should not be terminated when the issues of fraud and payment of the \$2,000 by Wm. A. Hoskins are decided.

For the errors stated the judgment is *reversed*, and the cause is remanded with directions to permit the amended cross-petition tendered by appellants to be filed and for further proceedings not inconsistent with this opinion.

Bradleys, for appellant.

Dunlap, for appellee.

TAYLOR YOUNG v. WM. D. GUDGELL.**Minor—Failure to Appoint Guardian.**

It is reversible error to render a judgment against a minor without having a guardian appointed to defend for him.

Minor's Contract, Enforcable When—Evidence.

The purchase of a horse by a minor to operate a farm upon which he was living as the head of a family, and from the use of which a support for himself and family was obtained; and the jury believed that the purchase by the minor of the house was necessary for the minor's use, though while he could not bind himself by the execution of a note therefor, the law will bind him to pay the reasonable value of the horse; and what he promised to pay for the horse, will be competent evidence conducing to show its value.

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OPINION OF THE COURT BY JUDGE PETERS:

The judgment was rendered in the court below against appellant, who was at the time a minor, without the appointment of a guardian to defend for him, contrary to the 55 *Section of the Civil Code*, which is an error available for reversal in this court, as was held in the case of *Pond vs. Dougherty* 18 B. M. 558.

It is proved by Williams, statutory guardian for appellant, that he was married and had one child, was living to himself on a farm purchased for him by the witness, that he was cultivating his farm, and managing it as he pleased when he purchased the mare, for the price of which, the note was given, that he used and worked her in making his crop, for which purpose she was suitable, and useful, and from the evidence of Mr. Weis it appears he sold her, and realized more for her than he promised to pay. If the jury from the evidence believe the foregoing facts and that the mare was necessary for the use of appellant, situated as he was, while he could not bind himself by the execution of a note, still the law will bind him to pay the reasonable value of the mare to appellee, and what he promised to give, for her, will be competent evidence conducing to show her value.

But for the failure to appoint a guardian to defend for appellant the judgment must be reversed and the cause remanded for a new trial and for further proceedings consistent with this opinion.

Curd, for appellant.

Stanton & Throop, for appellee.

BERNARD GUY v. DANIEL GUY.**Tenancy—Lands—Permanent Improvements.**

Under a lease or tenancy by permission, fencing, grubbing ditching and clearing lands are not permanent improvements, as all these things are necessary to be done to enlarge the products of the farm and increase the profits of the tenant, but improvements to buildings and the making of a cistern are of a permanent character and the owner is liable therefor.

Contracts—Verbal Agreement to Cultivate Farm—Pleadings.

In a suit for recovery of amount due under verbal contract to manage

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a farm, and "if the sum of \$1,000.00 is not made annually, the deficit to be made up by the owner," it must be alleged in the petition that this particular amount was not realized, and show in what the discrepancy will consist, in order to recover thereon.

APPEAL FROM LOUISVILLE CHANCERY COURT.

February, 13, 1868.

OPINION OF THE COURT BY JUDGE PETERS:

It is alleged in the petition that some time in April, 1859, or shortly before that time, appellant applied to appellee to take charge of his farm, and to take care of their mother, Mrs. Elizabeth Guy, their brother John, who then had charge of the farm having become dissipated, and that if he would relinquish his business in Memphis, and remove to said farm, cultivate it, and take care of their mother, that in consideration thereof he verbally promised to convey to him the farm, so soon as he completed a mill, which he and one Clark were erecting in the city of Louisville, that he did remove to the farm in April, 1859, and undertook to cultivate the same, and to provide for and take care of their mother, and after having occupied said farm some five or six months, and not being a practical farmer, fearing he could not make wages at the business, proposed to surrender it to appellant, to which he objected, and urged him to continue in the cultivation and occupation of the farm, and that he, appellant, would guarantee and make sure to him one thousand dollars *per annum*, and on the faith of said promise and agreement he remained on said farm, and cultivated and managed it in a husband-like manner to the first of September, 1864.

Appellee then proceeds to allege that after receiving an economical living for himself, family and mother, he expended very considerable sums of money in lasting and valuable improvements, which he enumerates, and concludes by alleging that when he surrendered possession of said farm to appellant he promised to pay him for his services, stock and additional farming implements purchased and left on the farm, and says "*he verily believes*" he ought to recover of deficient in consideration of the premises \$5,930, prays for a settlement of their account, for judgment, and for general relief.

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The alleged promise to convey the land is denied in the answer, as is the contract to pay, or to guarantee to appellee \$1,000 per year, as is all other material allegations of the petition, except it is admitted appellee occupied and cultivated the farm from April, 1859, till the latter part of August or the first of September, 1864. But it is expressly denied that any lasting or valuable improvements were put upon the land, except such as appellee put there for his own comfort, convenience and profit, and they were put there as averred by appellant without any agreement or promise on his part to pay for the same; and he pleads by way of counter-claim and set-off the use of the farm, the value of a number of cords of wood taken and sold by appellee, and other things, against any claim or damage appellee may have against him for improvements, stock, crops, &c. The counter-claim is controverted in the reply.

The case was referred to the master by the court below, with special instructions to charge appellee for a mare of appellant sold by him, for wood sold, for the use of the stock on the farm, when he took possession, of farming utensils, and work done in the spring of 1859, preparatory to the making the crops of that season, and the grain on hand. The the \$1,000 is to be disregarded, that appellee is to be credited for all the improvements made, ditching, grubbing, fencing, buildings, &c., and the new stock left on the place, and for the crops on hand when appellant took possession, for the land cleared if it was good economy to clear it, &c.

Under these instructions, the master made two reports; the first being excepted to, it was again referred, with directions to discriminate between the stock on the farm when appellee entered, and the stock he left there when he gave up the farm. Upon the last reference, the master reported a balance of \$4,450 in favor of appellee against appellant, to which exceptions were filed by the latter, but his exceptions were overruled, and judgment rendered for that sum, with interest from the first of September, 1864, till paid, and from that judgment this appeal is prosecuted.

The farm, as appeared, was cultivated from 1859 to 1864 inclusive of both years by appellee, and from his own showing, the promise to convey the land to him by his brother, after he had been there for several months, was not satisfactory to him, and he declared his intention to leave; when the contract was made

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by them, that he was to remain and cultivate the farm, and if he failed to realize \$1,000 per annum for his labor, appellant was to pay the deficit.

This contract is proved substantially by the mother of the parties, Mrs. E. Guy, and also by the sister Mrs. Thompson.

Although there is a general denial in the answer that such a contract was made, it is thus proved, and the facts accompanying the cultivation and management of the farm by appellee persuasively conduce to the conclusion that some such agreement was made by the parties, and it is difficult to account for the manner in which improvements were made, land cleared and implements supplied, and stock and crops left after the connection ceased, on any other hypothesis, and especially as there is no time proved when the contract was to end, it must be presumed the parties intended it to continue during the life of their mother, as her support and comfort seems to have entered into and formed a motive for the contract.

We are therefore of the opinion that the adjustment of the controversy was by the court below placed on the wrong basis. Whatever was the value of the lasting improvements put on the farm by appellee, at the time he surrendered the possession thereof to appellant, he should be allowed, deducting therefrom any sum or sums of money that appellant may have advanced to pay for said improvements, but for fencing, grubbing, ditching and clearing land he cannot be allowed anything, as those things were done to enlarge the products of the farm, increase his own profits, and for his own benefit; but the improvement of the buildings, and the making of the cistern, are of a permanent character.

The crops remaining when appellee left, he is entitled to the value of, and to the value of the farming implements, including wagons, harness, &c., and to the additional stock left by him, which he purchased; but he is not entitled to pay for the increase of the stock which he took of appellant's when he went in. He should be charged with what stock of appellant he sold, for the wood cut and corded on the place which he sold, and for the grain, &c., used by appellee, which was on the place, but not for the hire of the negro woman, as she was probably left there by appellant to serve his mother, and as there is no allegation in the petition

that he failed to realize \$1,000 per annum for the years preceding 1864, he is not entitled, as the pleadings now stand, for anything for those years; but it will be proper to permit the parties to amend their pleadings, upon the return of the cause, if application shall be made in reasonable time to do so.

As the judgement is based upon principles essentially different from those herein enunciated, and the result more unfavorable to appellant than an adjustment of the matters in controversy in conformity with this view will be as now appears, the judgment is reversed, and the cause remanded for further proceedings consistent herewith.

Bullitt, for appellant.

Pirtle & Caruth, for appellee.

PHILANDER BERRY ET AL V. WM. WHEATLEY'S HEIRS.

Deeds—Acknowledgment—Certificate.

The acknowledgment to a deed that the grantor appeared before the "Clerk of Logan County," and wherefrom the caption it appears that the acknowledgment was taken in the "County Clerk's Office" is held to be good, though the word "Court" is omitted after the word "County." But as it must be judicially known that there was no clerk of "Logan County" while there was a clerk of the County Court of said county, it is presumed that he, as such, was by law authorized to take the acknowledgment.

Notice of Meeting of Prosessioner—Appearance.

The appearance and entering of objections to some of the acts of the prosessioners, is held to waive formal notice of the time and place of their meeting.

APPEAL FROM THE UNION CIRCUIT COURT.

OPINION OF THE COURT BY JUDGE PETERS:

The first objection taken to the ruling of the court below is to the admission of a certified copy of the deed from Stewart the patentee, to Hardin; and it is insisted that the deed and certificate

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of acknowledgment do not show that the individual taking the acknowledgment was authorized by law to take the same.

From the caption it appears that the acknowledgment was taken in the "*County Clerks Office*," and in the body of the certificate it appears that the grantor appeared before the clerk of Logan county and acknowledged said writing to be his act and deed, &c., and then he certifies under his hand as clerk as aforesaid.

The certificate is somewhat informal in omitting to add the word "*Court*" immediately after the words "*Logan county*," but it must be judicially known that there was *eo nomine* no clerk of Logan county; while there was a clerk of the County Court of said county, and that he as such was by law authorized to take the acknowledgment of deeds, &c., and it would be extremely technical to decide that because the word *court* is omitted in the certificate, that the deed was not acknowledged before an officer authorized to act, although it is certain that it was acknowledged before a person who assumed to have authority to act. There is enough, in our opinion, in the certificate to show that the acknowledgment was properly taken.

Next it is objected that the report of the proccessioner's was admitted as evidence, when no notice was offered of the time and place of their meeting. It appears on the face of the report that appellant Berry was present, and objected to some things done; and his presence is shown by the evidence of the surveyor, and the proccessioner; it will therefore be inferred that he was notified, and as he was present, all was accomplished that a notice was designed to do. And as to the report of the first of October, 1847, that was made prior to the adoption of the Revised Statutes, and no notice was required under the former statutes, unless the testimony of witnesses was taken, and as no depositions were offered, the report might be read without the production of a notice.

No error is perceived in giving, or refusing instructions, and the verdict of the jury is sustained by the evidence.

Wherefore the judgment is *affirmed*.

Hughes, for appellant.

Lindseys, for appellee.

E. A. HENLEY v. J. G. TRIMBLE.

Bills of Exchange—Pleading—Petition—Demurrer.

In a suit on a promissory note or bill of exchange, and the petition does not aver protest, and notice, either for non acceptance or non payment nor aver any excuse as that the drawer had no funds with, or authority from the drawer to draw upon him, the petition is subject to a general demurrer.

Bills of Exchange—Setoff and Counter Claim.

Setoffs and counter-claims between the original parties cannot be adjudged against an assignee as to bills of exchange, which have gone into circulation in the regular course of business, for a valuable consideration.

Appeal and Error—Defective Pleadings in Court Below.

However defective a petition may be, after issue joined in the court below, no demurrer having been filed to correct the errors of pleading, it is too late to object for the first time in the Appellate Court, to the defects, especially as no motion was made for a new trial.

APPEAL FROM WOLFE CIRCUIT COURT.

OPINION OF THE COURT BY JUDGE PETERS:

The writings sued on, though styled and treated by both parties as notes, are really foreign bills of exchange, drawn at Cincinnati, Ohio, payable at Mt. Sterling, Kentucky, and which had been assigned to appellee. The petition does not aver protest and notice, either for non-acceptance or non-payment, nor does it aver any excuse, as that the drawer had no funds with or authority from the drawer to draw upon him, and would therefore have been liable to a general demurrer.

But appellant answered setting up defenses by way of set-off and counter-claim and issues thereon formed and submitted to the court and adjudged by it for \$1,025.25, with interest from May 19, 1866 in appellee's favor.

There is no bill of exceptions containing the evidence therefore, we must regard the defenses unsustained save so far only as not denied and treating the loaned buggy as not returned and worth the \$75 as alleged, still the judgment does not amount to more, nor indeed as much as the court might have adjudged.

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Even if it be conceded that under these issues off-sets and counter-claims existing between the original parties could be adjudged against the assignee, which cannot be done as to bills of exchange which have gone into circulation in regular course of business for a valuable consideration, still there is nothing in this case which authorized this court to reverse on this account. But it is insisted that no cause of action appears in the petition and that therefore the judgment should be reversed. However defective the petition might be, because of no sufficient averment as to no funds or authority to draw a claim, especially where no demurrer for either party was put in so as to illicit the judgment of the court below on the pleadings, it is too late to object for the first time in this court, no motion for a new trial being made below.

Judgment affirmed.

Simpson, Hazelrigg & Winn, for appellant.

Elliott, for appellee.

D. F. ROBERTS v. C. TROMPER & C.

Negligence—Personal Injury—Careless Driving on Streets—Infants.

D. F. Roberts, while driving rapidly through the streets of Louisville, ran over, and materially injured a child of some four years of age. The accident occurred at the curbing, where the child was seen to be trying to get up, when the buggy of Roberts ran over it. His attention was called to the child being ahead of him and in the street, but did not slow up or turn his horse so as to avoid the wheels of the buggy running up against the curbing, at the point where the child was seen to be clamoring up: Held to be contributory negligence by Roberts, and liable for personal damages sustained by the infant.

APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

September 23, 1868.

OPINION OF THE COURT BY JUDGE WILLIAMS:

A fair construction of the evidence in this case, as produced by

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both parties, harmonises as to one fact, to-wit: that appellee was standing on the curb stone of the pavement when by a too near approach of the vehicle, which appellant was driving at rather a brisk rate, caught and ran over her.

Several of appellee's witnesses state this positively and in direct terms.

Shadburn, for defendant, states:

"that looking over the dash-board of the carriage he saw a child lying in the street in front and to the left of the carriage; that he called Roberts' attention to the fact of the child being in the street, and thereupon Dr. Gilpin, who was in advance, was called; after Gilpin stopped his buggy, turned around and came back, Roberts having stopped immediately, the child was picked up and carried into the house, and waited upon by Dr. Gilpin."

Dr. McBurnies testimony was agreed to be the same, with the exception:

that he saw the child standing in the street some fifty yards ahead of the carriage of Roberts, and that Gilpin's buggy passed the child; that when he first saw the child about 50 yards ahead, he said to Roberts there was a child ahead of him in the street; Roberts was the on the same side of the street railroad with the child, and he made some effort to turn his horse, so as to cross the railroad, and as the buggy got near the child, *the wheel of it slighted down the curb stone and very near it, the last he saw of the child before the buggy passed it, was when it was at the curb stone with its hands on it as if trying to get on the pavement.*"

All this is perfectly consistent with plaintiff's evidence that the child was on the curb stone and thrown off by defendant's near driving.

If the child was attempting to mount the curb when McBurnie last saw her before the buggy passed, when he and Shadburn saw her prostrate in the street, must certainly have been after she was

knocked down, and so we would infer from Shadburn's statement.

The child had evidently been thrown down by some means immediately by the curb stone, and there is no clue to any other cause of her falling than the near driving of the defendant. The evidence, then, by no possible fair construction, makes a case of fault by this child, of about four years of age; hence, no error in either giving or rejecting instructions.

Roberts seems to have acted with kindness and humanity after the accident, and there is nothing in the case that indicates intentional wrong on his part, and though we might regard the verdict as somewhat harsh under all the circumstances, yet it is essential in large and crowded cities that those who drive vehicles for pleasure or profit should have a due regard for the safety of those who have as much right to traverse the street as themselves, especially for those on foot, who have the right to be on the pavement, where carriages propelled by horse-power have not.

As the evidence clearly shows this child was attempting to reach the pavement, and Roberts had notice of her being in the street fifty yards ahead, we can imagine no sound reason why she should have been run over except from a too rapid rate or unjustifiable carelessness.

The exceptions to the depositions were properly overruled.

Wherefore, the judgment is affirmed with damages.

Jackson & Ransom, for appellant.

Harlan & Newman, Muir & Bijuir, for appellees

PETER PARKMAN ET AL. v. M. W. REDD ET AL.

Street Improvement—Assessment of Property Covered by Railroad Track Ordinance.

The owners of property along a street, upon which runs a railroad track, cannot be required to pay for paving or otherwise improving so much of it as is covered by the railroad track, it being the duty of the owners of the track to keep it in order, consequently a general ordinance and the contract under it for paving, curbing, macadamizing and gravelling that street, without excepting the track, is illegal and not enforceable.

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Same.

But an amendatory ordinance requiring the improvement of so much of the street as is not touched by the railway track, is legal and binding against the property adjacent thereto.

Same.

An objection that in the commissioners report, or the petition that the "graveling" is not specified cannot avail, as it is a part of the macadamizing which the petition alleges was completed according to contract.

Evidence—Prima Facie.

The report, estimates and apportionments of street paving by the commissioners under the charter of the city is prima facie evidence of the liability of the property owners for the amount of the contribution assessed against them.

APPEAL FROM JEFFERSON CIRCUIT COURT, CHAN. DIV..

OPINION OF THE COURT BY JUDGE ROBERTSON:

As the owners of property on Grove street could not be required to pay for paving or otherwise improving so much of it as is covered by the railway track which it is the duty of the owners of the track to keep in order, consequently the general ordinance and the contract under it for paving, curbing, macadamizing and gravelling that street, without excepting the track, was illegal and not enforceable.

But on the 4th of April, 1866, before the work was done, so much of that ordinance as constructively embraced the whole street was repealed by an amendatory ordinance which restricted the required improvement so much of the street as was not touched by the railway. And the work was done, reported and accepted according to the amendment; and the cost was estimated by the number of feet of the ground actually improved. And this was all legalized by the amended ordinance and did no wrong or harm to any person, and entitled the contractor to the assessments as made against the appellants..

The report, and estimates and apportionments being, according to the charter, *prima facie* evidence and being untraded, no other fact was necessary to the liability of the appellants for the amount of contribution assessed against them respectively.

The objection that no gravelling is specified in the report or the petition is unavailing. The required gravelling was only

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a part of the macadamizing which is alleged and reported to have been completed according to the contract. And there is also abundant proof by witnesses that the gravelling was done, and well done.

In this state of case we see no substantial objection to the judgment against the appellants for the amount assessed against them.

Wherefore, as to each of them, the judgment is affirmed.

Stirman, for appellant.

R. J. Elliott, for appellee.

F. E. WALKER v. THOMAS SNOWDEN.**New Trial—Verdict Not Sustained by the Evidence.**

On the issues formed there was a contrariety of evidence before the jury, which it was their peculiar province to weigh. On well settled principal of practice, the Court should not have granted a new trial on the grounds that the jury had erred, unless the verdict was clearly against the evidence.

APPEAL FROM HENDERSON CIRCUIT COURT.

OPINION OF THE COURT BY JUDGE HARDIN:

The principal question presented for our decision is, whether or not the court erred in refusing to grant a new trial on the ground that the verdict of the jury was not sustained by sufficient evidence.

The action was for the recovery of a balance of \$300 as the reasonable value of work claimed by the plaintiff in the construction of an abutment and two road-ways upon the levee in front of defendant's farm on the Ohio River.

The defense admitted the employment of the plaintiff to do the work but controverted the claim, mainly on the ground that the work as performed was not of the value claimed for the plaintiff nor executed skilfully or in a workman-like manner.

On the issue thus formed there was a contrariety of evidence

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before the jury, which it was their peculiar province to weigh. For obvious reasons, and on well settled principles of practice, the court should not have granted a new trial on the ground that the jury had erred in their construction of the value of the work, unless the amount fixed by them was clearly unwarranted by the evidence. Such does not appear to have been the case, and it seems to us, the court did not err in refusing a new trial on the ground in question.

No error is perceived in the instructions or other rulings of the court to the prejudice of the appellant.

Wherefore, the judgment is affirmed.

John M. Brown, for appellant.

Cissel & Vance, for appellee.

MARY GRIMES ET AL v. WILLIAM S. GRIMES ET AL.**Wills—Construction—Devise to Wife for Her Separate Use—Exclusion of Husband.**

A devise to a wife which provided that she should have and enjoy the annual rents, hire, and interest of the estate, with the privilege of disposing of it by devise or gift as she might desire, is held to be a devise for the separate use of the wife to the exclusion of her husband's marital rights therein.

APPEAL FROM BOURBON CIRCUIT COURT.

June 9, 1868.

OPINION OF THE COURT BY JUDGE HARDIN:

The conclusion of the circuit court as to the rights of the appellee growing out of the alleged partnership between him and his father, is, we think, sustained by the weight of the evidence, and we perceive no error in the judgement establishing the appellee's right to one-half of the gold on deposit with Bishop & Brothers of Cincinnati, and to a portion of the stock sold at the sale of John S. Grimes, decd.

But we do not concur in the judgment adjudging the appellant

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M. E. Grimes' claim for rents, interest and hire of her estate in the hands of her husband as her trustee. The provision in the will of Nathan Bayless that the appellant should have and enjoy the annual rents, hire and interest of the estate devised to her, with the privilege of disposing of it by devise or gift as she might desire, is we think, indicative of an intention to devise the estate for the appellant's separate use to the exclusion of her husband's marital rights therein; and this construction is fortified by the fact that John S. Grimes seems to have recognized his wife's separate rights in the estate, and accounted to her for the rents, hires and interest accruing prior to the 18th of May, 1861, as sufficiently appears from the receipts exhibited. And under all the circumstances, as the rents, interest and hires do not appear to have been accounted for as to any time subsequent to the 18th of May 1861, we can see no sufficient reason for exempting the trustee's estate from liability, therefore or for diminishing or reducing the same by charging the appellant in favor of her husband's estate for the expense of her clothing or otherwise. Her husband appears to have been both able and willing to indulge her in living in a style appropriate to his station, and position in society, and there is nothing in this record showing either an intention or a right on the part of her husband to charge for her support.

We think the court erred in allowing credit to the estate of J. S. Grimes for the annual expenses of the appellant from and after the 18th of May, 1861, till his death.

Wherefore, the judgment is reversed and the cause remanded for a judgment in conformity to this opinion.

Davis, for appellant.

Prall, for appellee.

GEORGE W. MEAD v. A. J. LANSDOWNE

**Fixtures—Contract of Conversion—Property Becoming Part of the Freehold.
Mines and Mining.**

Under the law of fixtures, it is held that the placing on the premises by the lessee of impliments for the purpose of operating mines thereon, under the contract of lease, would not give the owner of the freehold a claim to the fixtures, when they can be removed without causing material injury to the estate. They remain the unquestionable property of the lessee.

Injunction—Conversion of Property Under—Liability on Bond.

On the dissolution of an injunction, personal property can be surrendered by the plaintiff to the defendant; the detention could not be treated as a conversion of them by the plaintiff, he being liable on his bond in consequence of the injunction, to the defendant for any damages sustained by him.

Contract—Construction—Lease—Fixtures.

A contract for the lease of a salt mine, amongst others, contained the following clause "Any materials and implements the said Mead may place upon the premises for the manufacture of salt and not counted fixtures, he, Mead shall have the right to remove for his use, unless said Dr. Lansdowne chooses to pay said Mead for the same at a fair valuation." Held, that this would not vary the legal signification of the term "fixtures," the impliments being merely erected for the purpose of trade, were subject to removal by the tenant.

APPEAL FROM CARTER CIRCUIT COURT.

May 23, 1868.

OPINION OF THE COURT BY JUDGE HARDIN:

On the 11th day of January, 1862, the parties Lansdowne and Mead entered into a contract whereby the former leased to the latter certain premises described as

"Dr. Lansdowne's salt furnace, with all the appurtenances thereto belonging, together with salt wells sufficient for the manufacture of salt at said furnace and the privilege."
of using coal, &c., in the business of making salt. Also
"the house and premises thereto belonging, known as the said Dr. Lansdowne's new store."
for three years from said date,

"in consideration of the said Mead building a yard fence

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around said house and putting it in general good repair. Also to construct a salt furnace for the manufacture of salt at the furnace above described and opening and working such wells as the said Mead may deem most expedient."

The parties further stipulated:

"that if the said Mead at any time abandons the manufacture of salt more than temporarily, he relinquishes all claim to this house, the said Dr. Lansdowne reserves the right to sink a shaft in any of the above wells by giving to said Mead notice of such intention in time that said Mead may in a reasonable time abandon such well, and if at any time the said Dr. Lansdowne sells his farm, he reserves the right to discontinue this lease upon first paying the said Mead for his improvements and the value of his interest in this house, the said Mead returning to said Dr. Lansdowne the above premises together with all kettles and tools that said Dr. Lansdowne may furnish said Mead, in as good order as they are now, and said Dr. Lansdowne to have peaceable possession of the same. Any materials and implements the said Mead may place upon the premises for the manufacture of salt and not counted fixtures, he, Mead, shall have the right to remove for his use, unless said Dr. Lansdowne chooses to pay said Mead for the same at a fair valuation."

Under said contract Mead entered into possession of the leased premises and engaged in the manufacture of salt; in the meantime making repairs, and providing salt pans and implements for use in said business in addition to those of Lansdowne, which were on the premises at the date of lease.

On the 14th day of December, 1864, Lansdowne filed a petition in equity against Mead exhibiting their said contract and alleging that the defendant was then about removing from the leased premises a portion of the fixtures pertaining to the freehold, including certain salt pans claimed by the plaintiff as fixtures, and to prevent such removal he sued out an order of injunction by which Mead was inhibited from removing any fixtures, implements, materials, tools or other things used or necessary for the manufacture of salt on said premises or situated thereon or in any wise pertaining thereto, until the further order of the court.

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It appears that amongst the articles, the defendant was thus restrained from removing there were six salt pans and various other implements which he had purchased for use in the manufacture of salt, and which he claimed as his own property, insisting that they were not fixtures, and that he had a right to remove them unless the plaintiff would purchase them, as he might according to the contract, and for the apparent purpose of requiring the plaintiff to elect to purchase them or allow the defendant to remove them, he caused to be served on the plaintiff the following written notice on the 20th day of December, 1864:

“Dr. A. J. Lansdowne:

“Take notice that I expect to remove my pans and other implements unless you see proper to buy them.

“Yours respectfully,

“G. W. Mead.”

And subsequently Mead filed an answer denying the alleged intention on his part to remove any property which the plaintiff had a right to claim, and controverting the plaintiff's claim, and alleging his ownership to said pans and implements.

In the meantime, Lansdowne brought an ordinary action against Mead for alleged breaches of said contract, in failing to construct a furnace, build a yard fence and repair the premises, according to his undertaking, and for waste and damages occasioned by the conversion or destruction of the property by Lansdowne.

In this action Mead filed an answer controverting the material averment of the petition, and upon a counter-claim against Lansdowne sought to recover against him the value of said salt pans and other property of which the plaintiff acquired possession with the leased premises, by means of the injunction which prevented their removal, and for loss occasioned by the interruption and suspension of defendant's business before the expiration of the lease, by the execution of the injunction.

This action having been transferred to equity, and consolidated with the injunction suit, the two causes were referred to a commissioner to audit the claims of the parties, whose report sustained the claim of Lansdowne to five of the salt pans which had been placed in the furnace and used by Mead in said business, and stated the account between the parties as follows:

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"Plaintiff's claim:

To not having house in repair	\$102.00
To fence around house	25.00
To 1 Hydrometer	1.50
	\$128.50

"To be credited by:

Amount in Schedule, Ky.	\$66.50
Amount of one broken salt pan, 1300 lbs., at 21½.	33.75
	\$100.25

Showing a balance of \$28.25 in favor of Lansdowne after allowing Mead credit by the broken salt pan, not used, and certain tools and implements, withheld under the injunction which in the opinion of the commissioner did not belong to Lansdowne under the contract.

In April, 1866, the court, on exceptions of both parties, to the commissioner's report, adjudged in substance as follows:

1. With respect to the salt pans, that the contract did not vary the legal signification of the term "fixtures" by which machinery attached, as the salt pans were, did not vest in the landlord on the determination of the lease, but being merely erected for the purposes of trade, were subject to removal by the tenant. But the plaintiff then offering in court to relinquish the possession of the pans to Mead, the court allowed him to do so, and refused to charge him with the value of the pans as proved at the time they came to his possession.

2. The court held Mead chargeable with \$30 for the value of certain iron rods converted into laths for his use on the ground that the rods belonged to Lansdowne.

3. The court further adjudged that instead of the sum of \$128.50 (including \$1.50 for a hydrometer) as allowed to Lansdowne by the commissioner for the failure to make the fence and repair the house, the defendant should be charged \$225 for such failure, besides the item of \$1.50, and thus fixing the amount of charges against the defendant at \$256.50, and allowing him credit by \$66.50 as fixed by the commissioner; the court rendered a judgment against Mead for \$190, and for three-fourths of the costs, and discharged said injunction. And from this judgment

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Mead has appealed to this court, and Lansdowne also seeks a reversal by cross appeal.

Before disposing of the questions raised, as to Mead's right to remove the salt pans and implements claimed by Lansdowne as fixtures, we will examine the judgment so far as it modifies the statement of account between the parties, made by the commissioner.

It seems to us the adjustment reported by the commissioner showing a balance of \$28.25 in favor of Lansdowne, was as favorable to him as should have been adjudged by the court. The additional charge of \$30 for iron rods seems not to have been authorized by the evidence, but on the contrary, it appears that the rods were Mead's own property, and never belonged to Lansdowne.

And the sums charged to Mead by the commissioner amounting to \$127 for failing to repair the house and fence, ought not, from the evidence, to have been increased by the court; the balance in favor of Lansdowne, on the adjustment of these accounts, should therefore have been \$28.25, as reported by the commissioner, instead of \$190 as adjudged by the court.

We concur with the court below that the contract did not alter the rights of the parties with respect to the salt pans and implements under the law of fixtures, and whether Mead had a right to remove them or not, depends on the solution of the question whether considering the purpose for which they were used and other circumstances attending their annexation to the premises, the property in them remained in Mead, or became vested in the owner of the freehold. And as it appears that they were placed on the premises by Mead, to be used in the business or trade of making salt, and might be removed without causing material injury to the estate, the continuance of Mead's property in them, and his right to remove them, were unquestionable. (Ferard's Law of Fixtures, 48.) It seems to us, also, that the court did err in allowing Lansdowne to elect to surrender the possession of the five salt pans to Mead, upon the dissolution of his injunction. He being liable on the injunction bond for the damages sustained by Mead in consequence of the injunction, no injustice was done to Mead, by the refusal of the court to treat the detention of the pans under the injunction as a conversion of them by Lansdowne. If Mead has

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sustained loss in consequence of the wrongful suing out of the injunction, he has his remedy by an action on the bond.

Both parties have complained of the judgment on other grounds than those we have considered, but we have failed to perceive any substantial error not already indicated.

But for the errors suggested, the judgment is reversed and the cause remanded for further proceedings consistent with this opinion.

And on the cross appeal the judgment is affirmed.

Ireland, for appellant.

James and Rise & Dulin, for appellee.

JEPHTHA ESTES v. WM. D. ABBOTT.

Bills and Notes—Waiver of Claim for Set—Off—Assignment—Declaration in Presence of Purchaser.

Where the maker of a note is present when a transfer thereof is made from one holder to another, and offers no objections thereto, but says that the note is good and offers to settle it by delivery to the holder of other collateral therefor, he will be considered as having waived any claims, demands, or off-sets he may have to the note.

APPEAL FROM OWEN CIRCUIT COURT.

June 15, 1868.

OPINION OF THE COURT BY JUDGE PETERS:

Appellant purchased of R. A. Jameson a tract of 223 acres of land in Owen county, for which he was to pay \$12 per acre in three installments, about \$1,000 of the price, which was the first installment, was to be applied to redeem the land, Grover having purchased it at a sheriff's sale for less than two-thirds of its value, and the residue of the price was divided into two equal installments, for which, notes were executed by appellant payable to J. W. Jones, a name suggested by Jameson, and perhaps there was no such man; but whether there was or not, he was not present

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when the notes were executed; they were delivered to Jameson, and Jones has never come forward to claim them.

The note which matured first, being for \$837.50, was, by Jameson, placed in the hands of Holeman Tackett, in a debt of \$150 he had paid for Jameson, and residue thereof was to be applied to the payment of debts of Jameson, for which appellee Abbott was bound as his surety, and which he has since paid.

Tackett subsequently delivered the note to Abbott, who brought this suit against Estes to coerce the payment thereof, and he resists a judgment against him on the ground that he had advanced money to Jameson, and paid it out to his use to within about \$14 of the whole amount of the notes, and pleads said advancements as a set off, against this note.

Judgment was rendered in favor of Abbott in the court below, and Estes has appealed.

H. Tackett proves, that when the note was delivered to Abbott, Estes was present, and did not claim any off set against it, but said it was good, and offered a note he held on Dr. Smith to Abbott in part satisfaction of this note, the note on Smith being for \$500 for land as he said, and his own note for the balance to make up the amount of the note Abbott held on him, which offer Abbott declined.

Abbott had paid to Tackett the \$150 which Jameson owed him, and took the note on Estes to himself, and had paid, as the evidence showed, more for Jameson than the note on Estes amounted to.

If it be conceded that Estes had advanced the amounts he claims to have done to Jameson, before Abbott got the note, his declaration to Abbott when Tackett delivered it to him, that it was good, and his offer to arrange and settle it by given to him Smith's note and his own for the residue of the debt, were a waiver of any off set he had against the note, and especially as by his declarations it must be presumed Abbott advanced to Tackett the \$150 which Jameson owed him to get the whole of the note; and any subsequent payments he may have made, he could have no pretense to claim a credit for.

But Tackett, Wilson and others, who also purchased land from Jameson, executed their notes for a part of the purchase money to Estes by direction of Jameson, which notes were for sums sufficient to indemnify Estes for the amounts claimed to have been advanced

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by him to Jameson, and he does not show satisfactorily how that money was appropriated.

As to the note for the last installment, he never claimed to have paid anything on it.

We concur with the circuit judge in his conclusions. Wherefore the judgment is *affirmed*.

Craddock, for appellant.

Lindsey, for appellee.

CHRISTOPHER WRIGHT v. MICHAEL NEVILL ET AL.

Exempt Property—Right of Husband to Convey Same for Use of Wife.

Property that is exempt from liability for the debts of the husband, can be conveyed in trust for the use of the wife, and a subsequent attempt to create a lien upon same by the husband would not affect the title he had already conveyed.

APPEAL FROM JEFFERSON CIRCUIT COURT. CHANCERY DIVISION.

September 28, 1868.

OPINION OF THE COURT BY JUDGE HARDIN:

Whether the deed of trust from Michael Carroll to Nevill was or not fraudulent as to the debt of the appellant, so far as it embraced property which was liable to Carroll's debts, as it appears that the horse and cow in controversy were exempt from liability for his debts under the exemption laws, he had a right to convey them in trust for the use of his wife, and his subsequent attempt to create a lien upon them in favor of appellant did not affect the title he had already conveyed.

It seems to us therefore the action was properly dismissed.

Wherefore, the judgment is affirmed.

John K. Greene, for appellant.

J. G. Wilson, for appellee.

ANDREW FERGUSON v. THOMAS J. GRIFFITH.

Usury—Voluntary Payment on Note Before Due, Does Not Stop Interest—Jurisdiction of Appellate Court.

The voluntary payment on a note before its maturity, gives the payor no right to stop the interest; therefore only so much as was paid over and above the legal interest, on the sum borrowed, would be usurious. An over-payment thus made of \$48.03 is a sum of which the Appellate Court has no jurisdiction.

APPEAL FROM JEFFERSON CIRCUIT COURT, CHANCERY DIVISION.

September 26, 1868.

OPINION OF THE COURT BY JUDGE WILLIAMS:

The debt and mortgage by Ferguson and wife to Griffith was not due until September 12th, 1867. They had stipulated to pay Griffith interest until that day for the use of the loaned money, a voluntary payment prior thereto gives them no right to stop the interest, therefore, only so much as was paid over and above legal interest, on the sum borrowed, until September 12th, 1867, was usurious. The payment of three hundred dollars July 25, therefore, only included \$21.78 of usury, the amount loaned on one year's time being \$262.50, which sum added to the attorney fee of \$25, also voluntarily paid according to a covenant in the mortgage, and interest on both sums from date of payment until the rendition of the judgment, January 3, 1868, would only make \$48.03, a sum which this court has not jurisdiction, therefore the appeal is dismissed.

Worthington, for appellant.

Harrison & Bennett, for appellee.

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MILLY H. DEAN *v.* MARANSEY BEALL.**Wills—Revocation—Writing Must be Executed—Proof.**

A paper cannot be regarded as a revocation of a will previously made, unless it was in fact a will or codicil, or a writing declaring an intention to revoke the former will, and executed in the manner in which a will is required to be executed, and that without proof of the contents of the paper, it could not constitute a valid revocation in either of those forms.

APPEAL FROM PENDLETON CIRCUIT COURT.

June 22, 1868.

OPINION OF THE COURT BY JUDGE HARDIN:

This was a controversy as to the validity of a paper purporting to be the will of William Angell, which was propounded by the appellee, Maransey Beall, and contested by Milly H. Dean, the testator's daughter and only heir at law.

It was proved in the circuit court that both the body and signature of said paper was in the hand-writing of William Angell, and the evidence as to his capacity to make a will at the time does not admit of controversy.

But the ground relied on for setting the will aside appears to have been that, in the fall of 1866 and nearly ten years after the date of the will, the testator constructively revoked it by the execution of another will.

There is proof in the record that the testator in the fall of 1866, complained that Mrs. Beall had secreted his will, and that he wrote a paper which he represented to be another will, and which was afterwards destroyed either by him or Mrs. Beall. But although one of the witnesses seems to have read some part of it, it does not appear to have been offered for probate, nor are there such facts disclosed in this record as to authorize its establishment as a will. And although it sufficiently appears that William Angell wrote the last named paper, and spoke of it as his will, it is not entirely certain from the evidence that he did not do so for the purpose of alarming or restraining Mrs. Beall, whom he charged with having become unkind to him, after the date of his former

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will, in which a provision was made for her, rather than to make a valid testamentary paper to be preserved and carried out as his will.

But whatever may have been his intention, in writing that paper, and however it may have been destroyed, it is plain that it could not be established as a will upon the evidence in this cause for the reason that its contents are not disclosed.

According to sections 9 and 10, of chapter 106, of the Revised Statutes, said paper could not be regarded as a revocation of the will previously made, unless it was in fact a will or codicil, or a writing declaring an intention to revoke the will, and executed in the manner in which a will is required to be executed. And it is clear that without proof of the contents of the paper it could not constitute a valid revocation of the will in either of those forms.

It seems to us, therefore, that the judgment establishing the paper propounded as the last will and testament of William Angell, deceased, is in conformity with the law and facts of the case, and consequently said judgment is affirmed.

Lee, for appellant.

Ireland & Duncan, for appellee.

JESSE C. FLYNN v. THOS. HART.

Fraudulent Conveyance—Rights of Creditors.

D. A. Davis purchased some land from one Calzer and received a title bond therefor, and shortly thereafter assigned said bond to his father-in-law, the appellant. Davis appeared to have been insolvent at the time of the purchase and the transfer of the bond, but continued to occupy the land, and made the payments due to Calzer as part of the purchase price for some time after the transfer of said bond to appellant. Held, that the assignment of the bond was fictitious and fraudulent as to creditors.

APPEAL FROM PULASKI CIRCUIT COURT.

June 12, 1868.

OPINION OF THE COURT BY JUDGE WILLIAMS:

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The continued occupancy of the land by D. A. Davis after his purchase from Calyer, together with the payments made by him to his vendor after the date of his assignment of Calyer's title bond to his father-in-law, Flynn, connected with his insolvent condition and total absence of any evidence of payment of the consideration set up by Flynn to him, and the inconsistency of Flynn's answer in saying that Davis still owed about \$180 when the bond was assigned to him in 1864, the real date of the assignment being February 3, 1865, and all the payments being made in December, 1864, January, 1865, and January, 1866, but the \$250 paid at the time of the purchase by Davis from Calyer and these all being made by Davis, leaves but little room to doubt that the whole arrangement between Davis and Flynn was fictitious and for the fraudulent purpose of preventing a sale of the land by Davis' creditors.

Wherefore, the judgment is affirmed.

James, Moore, for appellant.

Vaulwinkle, Fox, for appellees.

JAMES DYKES v. F. BLAKEMORE.

Landlord and Tenant—Discharge of Liability by Payment by Tenant to Husband—Death of Husband. Husband and Wife—Power of Husband Over Wives' Estate—Rent Collected by Husband.

Though under the revised Statutes, the husband cannot sell his wives' land, nor can they be sold for his debts; he has only the use of them; when they are leased by the husband for a period not greater than three years and he receives the rent therefor, such a payment would discharge the tenant from all liability to pay it again to the wife, or any one else, in case of death of the husband.

Same—Assignee of Rent Note.

As to the residue of rent, evidenced by a note to the husband, the wife is entitled to the same. Even though the note be not assigned by the husband and should, at his death, pass to his personal representative, he could not have collected it because, upon the death of the husband, the wife became entitled to the uncollected rent and the assignee of the note took it subject to that contingency.

Opinion of the Court.

APPEAL FROM CLARKE CIRCUIT COURT.

June 24, 1868.

OPINION OF THE COURT BY JUDGE PETERS:

It is certainly true that the estate which a husband acquires in the lands of his wife by the marriage since the adoption of the Revised Statutes, is essentially different from that acquired by the husband previous to their adoption. Instead of an estate in her lands during their joint lives, which he could sell or dispose of and which could be sold for his debts, he can not now sell them, nor can they be sold for his debts, he only has the use of them, and can lease them for not more than three years at a time; that he can do, and receive the rent. *Sect. 1, Art. 2, Chap. 47, 2 Vol. pp 8.*

By this enactment the power of the husband over the estate of his wife was greatly restricted. But when he leases his wife's land, for not more than three years at a time, he is in express language authorized by the statute to receive the rent. What would be the effect of the death of the husband before the end of the term as to the rights of the tenant for three years, and whether it would terminate the lease, we need not express any opinion, as that question is not involved in this case. But as the husband has the right, by the statute, to receive the rent when the lease is not for a greater term than three years, a payment of it to him by the tenant would discharge the tenant from all liability to pay it again to the wife, or any one else, in case of the death of the husband. As therefore appellant had paid to the husband of Mrs. Blakemore fifty dollars on the rent of the land, he was entitled to a credit for that sum.

As to the residue of the rent for which appellant executed his note, Mrs. Blakemore was entitled to the same. If it had not been assigned by Blakemore; and had passed to his personal representative, he could not have collected it; because upon the death of her husband, Mrs. Blakemore became entitled to the uncollected rent, and the assignee of the note took it subject to that contingency.

As the instructions to the jury are in conflict with these views, the judgment is reversed and the cause is remanded with instruc-

Opinion of the Court.

tions to award a new trial and for further proceedings not inconsistent with this opinion.

B. F. Buckner, for appellant.

J. Simpson, for appellee.

MARY CURRY v. PETER MCKINLY.**Competency of Witnesses Interested in the Issue—Parties to the Suit.**

Two witnesses, interested in the issue in a suit, on which they were called to testify, showed by their own testimony that they were not the immediate warrantors of the soundness of a horse, the possession of which was the controversy in the case, but they both testified that they "felt that they were interested in the result of the suit," as they would no doubt be called upon for retitution in case the suit was decided adversely to their respective warrantors. Held, that their interest in the controversy, as disclosed by them, was of such a certain nature as to render them incompetent, though it is held in *Easley's Exors., v. Easley*, 18 B. Monroe, 94, that a remote contingent interest in the decision of a suit does not render a witness incompetent, but is an objection which goes only to his credibility.

APPEAL FROM RUSSELL CIRCUIT COURT.

June 11, 1868.

OPINION OF THE COURT BY JUDGE HARDIN:

This was an ordinary suit against the appellant, to recover from her, an 'iron gray mare' claimed by the appellee; and it resulted in a judgment for the plaintiff, from which this appeal is prosecuted.

The grounds of the motion for a new trial, which was overruled, called in question the ruling of the court on several points raised in the progress of the trial, upon which exceptions were taken to the opinion of the court. Such of these, only as are deemed material or important, will be considered in this opinion.

Several witnesses were introduced by the plaintiff, who were objected to as incompetent, on the grounds which were disclosed

Opinion of the Court.

by them, on preliminary examination, which showed that each of them was a remote vendor of the plaintiff, as to the mare he claimed, as the same in controversy, having severally sold and delivered her for a valuable consideration, with an implied warranty of the title, which is the same under which the plaintiff claimed. One of these witnesses, George Wallen, testified that "he felt that he was interested in the result of this suit," and if it was decided adversely to the plaintiff he would be bound to refund the price he had received for the mare, of \$125; and another of them, who was the immediate vendor of Wallen, testified that he felt he would be responsible to Wallen, if the case should be decided in favor of the defendant. Were these witnesses disqualified by the interest thus disclosed by them in the result of the action?

A remote contingent interest in the decision of a suit does not render a witness incompetent, but is an objection which goes only to his credibility; (*Easley's Exors. vs. Easley* 18 B. Monroe 94). But although the witnesses were not parties to the issue, on which they were called to testify, and neither of them was the immediate warrantors of the mare to the plaintiff, it seems to us their interest in the controversy as understood and disclosed by them, was of such a certain nature as to render them incompetent.

By the 6th division of section 670 of the Civil Code, as it has been construed by this court, (*Chenoweth vs. Fielding* 12 Met. 519) persons who are interested in an issue, although not parties to the suit, are incompetent to testify in behalf of themselves; or in other words to testify in favor of a party in whose success in the case, they have a certain interest.

From this view it resulted, that the court erred, in over-ruling the objection to the competency of the witnesses referred to, and in permitting them to testify, notwithstanding the objection.

Wherefore, the judgment is reversed and the cause remanded for a new trial and further proceedings not inconsistent with this opinion.

Garnett & Baker, Barmlette, for appellant.

James, Owsley, for appellee.

Opinion of the Court.

JONATHAN K. BAILEY ET AL v. GEORGE B. HOWARD.

Warranty—Purchaser of Slaves Took Them Subject to any Change in the Law—Contract—Contingency.

The purchasers of slaves, whilst slavery was an institution of this State, took them subject to any change in the law by which such property was held, unless they expressly provided in their contract for the contingency.

APPEAL FROM HARLAN CIRCUIT COURT.

June 8, 1868.

OPINION OF THE COURT BY JUDGE PETERS:

This is an action on a note executed by appellants to appellees as the executors of J. Kelly, deceased, on the 15th of February, 1861, and due twelve months thereafter for the price of a slave Caroline, of the estate of their testator.

Two grounds of defense are relied upon, *First*, that at the time of the sale, appellees warranted said Caroline to be a slave for life, and by the adoption of the amendment to the Constitution of the United States, whereby slavery was abolished, and Caroline was emancipated, their covenant of warranty was broken. *Second*, that George B. Howard had paid to Mrs. Kelly, the widow of appellees' testator, \$500 which should be credited on the note, she having an interest in the fund as a legatee of testator.

Giving to appellants the benefit of the most latitudinous construction that the language in which they allege the bill of sale was written, will admit (for the document is not filed), and it only amounts to a warranty that Caroline, at the date of the sale, was a slave for life; her *status* at that time, was the subject about which they contracted, and until it is shown, that it was different from which appellees warranted it to be, there cannot be a breach of the covenant of warranty.

It is not alleged that appellees expressly covenanted that the Constitution and Laws of Kentucky by which slavery was tolerated, should never be changed, and the law would not imply an undertaking of that sort from the terms of the bill of sale as stated in the answer.

Opinion of the Court.

The purchasers of slaves, whilst slavery was an institution of the state, took them subject to any change in the laws by which such property was held that the people of the United States, or their legally constituted agents might make, unless they expressly provided in their contract for the contingency, and as it is not alleged that Caroline was not at the date of the bill of sale a slave for life, according to the laws, as then in force in Kentucky, that portion of the defense was unavailing.

As to the second ground relied upon, it is sufficient to say that as the payment relied upon was to Mrs. Kelly, and she undertook that a credit should be allowed therefor on the note, appellants must look to her if appellees who are and were then the legal holders of the note refuse as they do, to allow them a credit for the amount paid. As to the validity of the alleged contract, and the effect of the payment to her of Confederate money, they are questions which will be considered and determined when they are properly presented to this court for adjudication. It results from what has been said that the circuit judge erred in over-ruling appellants' demurrer to the answers of appellees. Wherefore, the judgment is *reversed*, and the cause remanded with directions to sustain the demurrer to the original and amended answers and further proceedings consistent with this opinion.

James & Farmer, for appellant.

Rodman, for appellee.

A. G. KELLEY, ADME. OF WALLS ET AL v. W. B. CRADDOCK.

Judgment of Sale—Death of Defendant—Revivor.

After a judgment, ordering a sale of land and before the sale had taken place, the defendant died, notwithstanding which and without a revivor, the commissioner proceeded with the sale and same was confirmed. Held, that the sale and confirmation were nullities, as there were no parties before the court; it was as requisite to revive as though no judgment had been rendered.

APPEAL FROM HART CIRCUIT COURT.

June 26, 1868.

Opinion of the Court.

OPINION OF THE COURT BY JUDGE WILLIAMS:

After a judgment ordering a sale of W. E. Walls' land to pay appellee's debt, and before the sale said W. E. Walls died, notwithstanding which, and without any revivor against his heirs or personal representative, the commissioner proceeded with the sale, which the court confirmed.

On a motion for a writ of possession, the widow and heirs and administrator object and present the above facts, but still the court ordered the writ. The sale and the confirmation were nullities, as there were no parties before the court; it was as requisite to revive as though no judgment had been rendered. The judgment allowing the writ of possession and orders confirming the sale are reversed, and the court directed to set aside the sale and cancel the commissioners deed, with leave to the parties for such further proceedings as may be necessary to revive the judgment.

Barrett & Edwards, for appellant.

Underwood, for appellee.

CROPPER, PATTON & CO. v. SHERMAN, HALL & POPE.

Pleadings—Appeal and Error—Amendments Allowed.

"Ordinary actions are unlike suits in equity; in the latter, the Court of Appeals almost universally settles the rights of the parties, on the pleadings and evidence in the case, and the court below has only to carry out the direction of the Appellate Court, but in ordinary Actions, a new trial only is awarded. Hence, amended pleadings if offered, in good faith and reasonable time so as not to indicate a spirit of vexatious delay, should be liberally indulged, so as to make the issues conform to the facts and evidence."

New Trials Granted in Ordinary Actions—Evidence in Former Trial—Amended Pleadings.

Where a new trial is awarded by the Court of Appeals in an ordinary action, the parties are not bound by the evidence on the former trial, but can introduce it over again with such alterations and additions as they see proper; hence amended pleadings should be liberally indulged in.

Opinion of the Court.

APPEAL FROM JEFFERSON CIRCUIT COURT. COMMON PLEAS.

June 5, 1868.

OPINION OF THE COURT BY JUDGE WILLIAMS:

This case was reversed when before this court on a previous occasion because there was no proof of a custom in the Board of Trade of Chicago to put up margin, else either party had the right to abandon a contract; and because as there was no such stipulation in the written memorial of the contract nor any averment that it was left out by mistake, oversight or fraud, therefore, parol proof of such stipulation was irrelevant; and particularly because while an interested witness had been permitted to testify for appellants. On the return of the cause appellants offered to amend their answer and in it averred that such stipulation was a part of the original parol contract which had never been abandoned, that when appellees presented the written memorial for appellants to sign, that it was then mentioned, as a stipulation, but appellees agreed that the margin should be considered as put up and that they would in fact put it up the next day, but which they did not do and though requested on several subsequent days still failed until the price of corn had declined, and then avers that the stipulation was left out by the fraud procurement of appellees, which amendment was erroneously rejected.

Appellants also filed an affidavit stating that they could prove these facts by a man who was then doing business for them in Chicago, but who was now a resident of Louisville but was an itinerant collector for a firm in New York and had been about ever since the return of the cause from this court and was still absent, and that they could not notify the parties so as to take his deposition because they could not ascertain where he would be on a given day; that they believed he would return before the next trial day and they could get his evidence &, but the court erroneously refused then a continuance.

Suits in ordinary are not like equity suits; in the latter this court almost universally settles the rights of the parties on the pleadings and evidence in the case and the court below has only to carry out the directions of this court, but in ordinary suits a

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new trial only is awarded and the parties are not bound by the evidence on the former trial but can introduce it over again with such alterations and additions as they see proper; hence amended pleadings, if offered, in good faith and reasonable time so as not to indicate a spirit of vexatious delay, should be liberally indulged so as to make the issues conform to the facts and evidence and have a fair trial upon the real merits of the case.

We think it was erroneous to refuse the amended answer offered, also to refuse to continue the cause on the offered affidavit, and therefore the judgment is reversed with directions to allow the amended answer and for further proceedings.

Renich & Lee, for appellants.

Bodley & Simrall, for appellee.

TALITHA EVANS v. R. PREWITT ET AL.

Female Guardian—Marriage—Funds Belonging to Ward which Passes Into Husband's Hands—Legal Rights of Ward—Priority of Claims as to General Creditors.

Whilst our Statutes provide that upon the marriage of an executrix or administratrix, her fiducial powers shall cease, no such provision exists as to female guardians; and as funds belonging to her wards in her hands, which may pass into her husband's hands as fiduciaries, and not in his hands merely as borrower. An equitable construction of the Statutes attach the same legal rights to the wards against him, as though he had been legally, a strictly appointed guardian.

Same.

As the influence and power of the husband over the wife, would likely superinduce violations of her fiducial duties, he should incur with her, when he does so, at least equivalent fiducial responsibilities; and as the use, by him, of the ward's money, without personal security, was a violation of the wife's fiducial duties which attached fiducial responsibilities; we think these attach to the husband, and that the ward's should equitably be entitled to all their rights as against him to the mother, had she been insolvent, and consequently entitled to priority over the general creditors, so far as the husband may have had their funds in his hands.

Opinion of the Court.

APPEAL FROM FAYETTE CIRCUIT COURT.

June 13, 1866.

OPINION OF THE COURT BY JUDGE WILLIAMS:

This was a suit brought in the Fayette Circuit Court by Robert Prewitt as assignee of Silas Evans, against said Evans' creditors and others, to adjust the conflicting claims to the assigned property, to determine who were creditors of said Evans, adjust their priorities and equities, and for a sale of the trust property, and a distribution of its proceeds. Hence, however erroneous may have been the judgment of the Clark Circuit Court, rendered May 6, 1859, in which the conflicting claims of Silas Evans and his children, by his deceased wife Pasrule Evans, to her distributive share in her deceased father's estate may have been, it cannot be inquired into in this suit, but it is binding and conclusive until opened or reversed by the proper appropriate proceedings.

Talitha Evans, the second and present wife of Silas Evans, was at the time of their marriage and still continues to be guardian for the minor children by her first husband, Walls, and had in her hands some several thousand dollars of their funds, a part of which assets was loaned to him before, and some since their marriage.

The court rejected the notes of Silas Evans to his wife as guardian, evidencing this indebtedness, and resorted to the county court settlements and other evidence to ascertain how much of said funds were in his hands, and having ascertained this, ordered a pro rata allowance thereof, out of the insolvent debtor's estate, with his other creditors.

If he had been the legal technical guardian, this class of creditors would have been entitled to priority and full satisfaction of their claims before general distribution among the general creditors. Whilst our Statutes provide that upon the marriage of an executrix or administratrix, her fiducial powers shall cease, no such provision exists as to female guardians; and as funds belonging to her wards in her hands which may pass into her husband's hands are not in the strict legal sense loaned out, but should be regarded in her and her husband's hands as fiduciaries and

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not in his hands merely as a borrower, we think an equitable construction of the statutes should attach the same legal rights to the wards against him as though he had been strictly and legally appointed guardian.

As the influence and the power of the husband over the wife would likely superinduce violations of her fiducial duties, he should incur with her, when he does so, at least equivalent fiducial responsibilities; and as the use, by him, of the wards money without personal security was a violation of her fiducial duties which attached fiducial responsibilities, we think these attached to him and that the wards should equitably be entitled to all their rights as against him to the mother, had she become insolvent, and consequently entitled to priority over the general creditors so far as he may have had their funds in his hands.

This being the only error perceived in the judgment, it is reversed for this alone with directions to correct this error by further appropriate proceedings, as herein indicated.

Kinkead & Barr, for appellant.

Hume & Beck, for appellees.

JOHN SHARP v. NATHAN, POWEL & ADAMS.**Land—Sale in Gross—Deficiency.**

When the vendor knows there is a material deficiency in the number of acres of land sold, the law will not permit him to conceal this, nor to represent the number of acres in gross and then escape responsibility by the use of the words, "more or less."

Notes—Assignment—Credits—Attitude of Assign.

Where two notes are due, one only of which has been assigned, the court will apply credits to the unassigned note, but not so when the unassigned note is not due.

APPEAL FROM NICHOLAS CIRCUIT COURT.

February 1, 1868.

OPINION OF THE COURT BY JUDGE WILLIAMS:

Opinion of the Court.

The evidence conduces to establish that Adams knew the tract of land he sold to Sharpe contained only about $13\frac{1}{2}$ acres when he sold it in gross representing, both verbally and in the deed, that it contained 146 acres more or less, and no evidence establishes Sharpe's knowledge of this. Had he declared to Sharpe that the tract had been surveyed and only actually contained the former number of acres it would undoubtedly have had a material influence with him; at least when a vendor does know that there is a material deficiency, the law will not permit him to conceal this nor to represent the number of acres in gross and then escape responsibility by the use of the words "More or Less."

As Adams has got one third cash for this deficiency, which he was not entitled to, and got the notes of the vendee at 1 & 2 years for the other, we can no doubt if he had retained these notes, Sharpe would be entitled to apply this deficit to the first note due, as this would but equalize the payments, and Powell, his assignee, stands in no better attitude than would his assignor, If both notes had been due and one had been assigned and the other not, the court would have applied the credit to the unassigned note, but not so when the latter note is due. The judgment is reversed with directions for further proceedings as herein indicated.

Stanton & Throop, Kennedy, for appellant.

Norvell, for appellee

T. S. THOMPSON v. WILLIAM ROARK ET AL.**Land—Sale—Verbal Contract.**

A verbal contract for the sale of land is not legally obligatory upon either party, until some writing evidencing the sale; and sufficient to take the contract out of the operation of the Statute of Frauds. is executed by the vendor and accepted by the vendee.

OPINION OF THE COURT BY JUDGE PETERS:**APPEAL FROM TAYLOR CIRCUIT COURT.**

February 1, 1868.

Opinion of the Court.

The contract for the sale of the land for which the notes sued on, were excuted, was verbal, and after the first and second installments were due, and actions were brought by the vendor for coercion of payment, and an enforcement of the vendor's lien, he tendered a deed in execution of the contract on his part, and insists that the tender of the deed rendered the contract valid altho, at the time, it was entered into, it was within the statute of frauds, and no action could be maintained upon it by either party.

In *Curnett vs. Roberts* 11, B. M. 42—this court said a verbal contract for the sale of land is not legally obligatory upon either party, until some writing evidencing the sale, and sufficient to take the contract out of the operation of the statute of fraud, is executed by the vendor, and accepted by the purchaser—and the cases of *McDowell vs. Dunlap*, 2 Mar. 33, and *Murray vs. Pate*, 6 Dana are referred to.

Appellees did not even acquire the possession of the land under said contract, they perhaps repaired a house, and burned a tobacco bed on the place, but it was abandoned, and the tenant who was living on the place at the time of the contract continued in possession, and appellees were not in fact put in possession and derived no benefit from the contract. Nor has appellant sustained any loss or prejudice.

The contract therefore being within the operation of the statute could not be enforced. Wherefore, the judgment is affirmed.

Howell, for appellant.

Montague, for appellee.

MICHAEL OLIVER v. GEORGE W. BRUCE

Promissory Note—Assignment—Diligence—Insolvency.

The failure to issue an execution for ten days after it might have been done, is such want of diligence as will exonerate the assignor; and the procro of insolvency, when the execution was delivered to the sheriff, cannot dispense with diligence in issuing it.

Opinion of the Court.

February 11, 1868.

OPINION OF THE COURT BY JUDGE ROBERTSON:

A long series of adjudications by this court have conclusively defined a rule peculiarly stringent for determining the diligence required of an assignee of a promissory note by the implied contract of assignments, in every phase of circumstances and the principle thus authoritatively fixed and applied, sustained the judgment of the circuit court. The failure to issue execution for ten days after it might have been issued, without a satisfactory explanation of the delay, has been adjudged such a want of legal diligence as to exonerate the assignor.

The explanation of the delay in this case fails to show ordinary diligence by either the assignee or his counsel; and the clerk testified that, had an execution been ordered at any time after it could have been legally issued, he would have issued it forthwith, but that no such order or request was ever made.

The obligor seems to have been shuffling off his property about the time when the judgment was rendered. And the proof of his ostensible insolvency when the execution was delivered to the sheriff cannot dispense with diligence in issuing the execution any more than it would have dispensed with any execution at all. Legal diligence and official proof of insolvency combined can alone hold the assignor responsible *ita lex scripta*.

Wherefore, the judgment is affirmed.

Thomas & Phister, for appellant.

Wadsworth, for appellee.

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MARY OVERBY v. SILVESTER OVERBY.

Apprenticing Children—Age—Judgment.

It is an essential part of every judgment, ordering the apprenticing of a child, to ascertain and fix its age.

APPEAL FROM BALLARD CIRCUIT COURT.

February 11, 1863

OPINION OF THE COURT BY JUDGE WILLIAMS:

The appellee was the former owner of appellant and her two sons, Jo and Reeves, and upon his motion a summons was issued against the mother to show cause why the boys should not be bound as apprentices, she appeared and contested the cause, and various witnesses were examined as to her qualifications to rear them "in moral courses" as well as to appellee's qualifications to do so, and there was a contrariety of evidence as to both. The court however ordered that the clerk "do bind out, to said Silvester Overby, said colored boys, Joseph and Reeves Overbey, until each of arrives at the age of 21 years, to learn the art and mystery of farming," and the mother prosecutes an appeal.

By Sec. 4, Art. 1, chap. 64, Rev. Statutes, 2 Stant., 137, it is provided that, "the term of every apprenticeship shall be until the minor attains the age of twenty-one years, if a boy, or eighteen years if a girl."

In order therefore that the apprentice shall not be compelled to serve longer than the period so fixed, it is an essential part of every judgment ordering the apprenticing of a child to ascertain and fix its age, and not leave this to the discretion of the clerk. By ascertaining the age the record will admonish the clerk what period of time the apprentice will have to serve, and to so fix the covenant and to be record evidence to it when the apprenticeship expires.

We have reversed the judgment, at the present sitting, in Jones v. Jones, because the court fixed the age of the apprentice younger than the evidence justified and thus did injustice to it.

For this error the judgment must be reversed, and as on the

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next trial the evidence may be materially different, we will express no opinion as to other points.

Judgement reversed.

J. D. White, for appellant.

James, for appellee.

SAMUEL W. LANGLEY v. S. G. TAYLOR.**Instructions—Abstract Proposition.**

An instruction upon a mere abstract proposition of law should never be given without some evidence to authorize it.

APPEAL FROM HENDERSON CIRCUIT COURT.

February 7, 1868.

OPINION OF THE COURT BY JUDGE PETERS:

Evidence that appellee was a member of a company of a regiment that was attached to the Confederate Army, and that orders were frequently issued by the commanding officer to the officers of companies to have their men mounted by the impressment of horses, could furnish no sufficient authority to appellee to impress the horse of appellant. He failed to produce an order direct to him by an officer of the regiment authorized to give such order, or to prove by any one that he received such order, and in the absence of such evidence there was nothing on which to base the instruction given, which, as a mere abstract proposition of law may be correct; but should not be given without some evidence to authorize it.

Wherefore, the judgment is *reversed* and the cause is remanded for further proceedings consisent herewith.

Turner & Tafton, for appellant.

J. T. ROBINSON ET AL v. L. R. STEELE ET AL.

Appearance—Exceptions to Commissioner's Report Regarded as Sufficient—Service.

The filing of exceptions to a master commissioner's report, by an administrator, who had not been served with process to the suit is held to be a sufficient appearance.

APPEAL FROM GALLITIN CIRCUIT COURT.

June 17, 1868.

OPINION OF THE COURT BY JUDGE WILLIAMS:

Robinson being administrator *de bonis non*, with the will annexed, of Upton Steele, and having received assets from the executors who first undertook the execution of the will, and having failed to pay the bequests to the minor plaintiff, Letitia Steele, who sues by her guardian, and her brother, W. B. Steele, they brought suit for a settlement and for judgment for the amount coming to them.

After the answer of the administrator was filed, A. Gibson's children, by petition, were made parties and asserted claim and asked judgment for the legacy due them; to this the administrator made no response and had no service of process.

The cause, however, was referred to a commissioner for proof and to state the accounts of the administrator and these claimants, and he reported the amount due each respectively.

To this report the administrator took various exceptions, not only to the allowance to the Steeles, but also to the Gibsons, and this must be regarded as an appearance to the latter's suit, even if the proceedings in their behalf had been irregular.

The court overruled his exceptions, and he asks a correction of the judgment.

After regarding all the exceptions, we find but the following errors:

The assets to be distributed are set down by the commissioner at	\$18,451.07
One-fifth of which is	3,690.21
Whilst he reports it at	3,879.17

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This evidently being a mistake of calculation, and perhaps might be regarded a misprision, but for an exception to it, and which is also overruled; when this is corrected,

the amount due W. B. Steele is	\$344.70
instead of the adjudged amount of	439.18
there is due the minor L. Steele	495.10
instead of the adjudged amount of	589.59
And there is due the Gibsons	408.72
instead of the sum adjudged	597.68

For these errors, the judgment is reversed, with directions to the court below to correct them.

Winslow, for appellants.

BENJAMIN McFALL v. DANIEL BOONE'S TRUSTEES.

New Trial—Affidavit Must Show Good Defense—Unavoidable Absence.

To entitle an appellant to a new trial, it is not sufficient to show that he had a good excuse for being absent from court; but he must show a good defense to the action by setting forth that defense to enable the court to judge of its sufficiency, and that he had made the necessary preparations or efforts to be ready to try the case, and that he was prevented from making his defense by his absence, which was unavoidable.

APPEAL FROM WOODFORD CIRCUIT COURT.

June 5, 1868.

OPINION OF THE COURT BY JUDGE PETERS:

It appears from the petition, that Boone had, before the institution of the action, conveyed *all his* estate, real and personal, to the plaintiffs which passed to them the legal title, and the right to maintain the action in their own names, and the petition therefore stated the requisite facts to constitute a cause of action in them.

As to the other grounds relied on for a reversal, it may be observed that it is not sufficient to show that the appellant had a good excuse for being absent from the court; but he must show

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that he had a good defense to the action by setting forth that defense to enable the court to judge of its sufficiency, and that he had made the necessary preparations or efforts to be ready to try the case, and that he was prevented from making his defense by his absence, which was unavoidable.

Two of the essential elements necessary, indeed, indispensable to authorize the court to set aside the judgment, and award a new trial, were omitted in the affidavit of appellant.

Wherefore, the judgment is *affirmed*.

Turner & Twyman, for appellant.

Porter & Greathouse, for appellee.

W. J. MILLER v. B. P. DRAKE.

Rent—Tenant Liable for After Conveyance by Landlord—Implied Right to Ingress and Egress.

A conveyance of land with a reversion that the tenant then in possession should have the use of the land until the fall of the year in which the land is sold, gives the tenant the implied right of ingress and egress thereafter for the purpose of removing the crop raised by him on the land; and the tenant is not liable for rent for this use of the land.

APPEAL FROM MONTGOMERY CIRCUIT COURT.

June 24, 1868.

OPINION OF THE COURT BY JUDGE ROBERTSON:

The statutory provision which merely recognizes the common law doctrine,—that rent to become due after a conveyance of the title by the landlord goes with the reversion,—does not apply to this case, because the uncontroverted endorsement on the deed shows that Miller, the vendor, was to retain the possession and use of the land until the 15th of September, 1864; and consequently, the resulting right to cultivate implied that it was not as tenant liable for rent to the vendee, but for the benefit of the vendor. And the right to cultivate implied a right of ingress and egress,

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and the 15th of September, 1864, for the purpose of securing and removing the crop.

It seems that, subject to that incidental right, the possession of the vendee after 15th September, 1864, was undisturbed except so far as one of Miller's tenants refused possession to sow wheat in a field of his corn.

Miller's right to occupy and use for his own benefit free of rent, is forfeited by Drake's purchase from him of a portion of the corn raised after the conveyance, and by other acts and implied recognitions.

Consequently, the circuit court erred in charging Miller with the value of the corn which he claimed and sold as his own.

For this error the judgment is reserved and cause remanded for another judgment consistent with this opinion. If Drake suffered any damage from disturbance in sowing wheat, a counter-claim may adjust it.

T. Turner, for appellant.

Reid & Reid, Hazelrigg & Winn, for appellee.

W. E. SURBER, v. HENRY P. FLOYD & FORD.**Fraudulent Assignment by Father of Property to Infant Son.**

A father, by deed of gift to his minor son, transfers all his property in consideration of the son becoming "emancipated," or deprived of any parental help or assistance or expectancy at the death of the parent. The father was heavily involved, quite old and unable to support himself and family by manual labor. Shortly after this deed was executed and delivered, judgment creditors of the father levied on and sold all the land conveyed in the deed to the son, and it was bought in by one of the creditors, but was redeemed by the son just prior to the expiration of the redemption period, and an order secured from the purchaser to have the deed of purchase at the execution sale, made to the son. It is shown that the son was only 18 years old, had no property of value, and it is not shown where he secured the funds to redeem the land, which required quite a sum of money. Other judgment creditors seek a resale of the same land: Held, that the deed of conveyance to the son was fraudulent and without consideration as to creditors and the land ordered sold to satisfy their claims.

Opinion of the Court.

APPEAL FROM PULASKI CIRCUIT COURT.

June 18, 1868.

OPINION OF THE COURT BY JUDGE PETERS:

An examination of the evidence in this case must satisfy the mind that there has been a carefully prepared plan, attempted to be carried out, designed by the father and perhaps by both, to place appellant, a son of seventeen years of age, in a condition to assume the ownership of the real estate of his father, whereby the whole of it should be removed from the reach of creditors.

The execution of a paper by Thomas Surber, unusual, if not remarkable, in its character, cannot escape observation as the first act with which the plot opens. By which he attempts not only to surrender to his minor son such property as he might then claim, whether he was in fact entitled to any or not, and to secure to him all future acquisitions; but to deprive him as far as he could of the privileges and protection which the law throws around the inexperience of his non-age, and the improvidence and indiscretions of his youth. And although poor and without the means of supporting himself and family, and unable from disease to labor, this father surrenders to his son all claims on him for his services to aid him in his struggles with disease and poverty; and to complete the job, and notify the world of the sacrifice of himself, to advance his son, he registers the act with the recording officer.

For all this, there must be a motive, and as aids, in ascertaining the motives of these parties, dates become important.

The writing, which has just been commented on, was executed 26th of April, 1862, and acknowledged the same day.

On the 18th of June, 1862, a *venditioni exponas* issued from the office of the Pulaski circuit court, against Thomas Surber, the father of appellant, to the sheriff of said county, commanding him to sell his estate consisting of the lands in controversy, and one yoke of oxen, which he had previously levied an execution on; the lands were sold in obedience to the command of the writ, and John Owens purchased the 90 acres at \$15; Thomas Durham the 17½ acres tract at \$16, and said Owens the 74-acre tract at \$184 30-100, which more than satisfied the debt in the *ven. ex.* named, and the surplus was credited on an execution in the

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sheriff's hands against said Thomas Surber, in favor of J. Russell.

The tract of 90 acres was valued at \$3 per acre, the tract of 17½ acres at \$3, and the 74 acres at \$7 per acre, as shown by the return of the sheriff.

The redemption money was paid just before the time expired, as is manifested by the record, to the purchasers by appellant, and they gave him an order to the sheriff to convey the lands to him. After that, Thomas Surber was insolvent, and appellees being judgment creditors have no hopes of making their debt unless these lands are subject thereto.

The next inquiry is, where did appellant get the means to redeem the lands with? He was only a little over 18 years of age; he had never received any estate by gift or devise or descent, or, if he had, the record fails to show it; his brother-in-law Stringer, who was intimate in the family, and knew all about their means and resources, was not aware that the young man had any money, or other property, except a horse, and a few hogs; the horse his father gave him, and where and how he got the hogs is not shown; he sold the horse for \$90, and he sold one hog—the price is not told; nor does it appear what became of the other hogs.

This witness proves there were some debts in the way of uncollected taxes due Thomas Surber, the most of which, the witness himself collected, and paid over to said Surber about the time of these transactions, and it seems that he then had the money, a portion of which was paid out for a horse sold by the sheriff as the property of said Thomas, and which the witness bought in for him; that horse appellant afterwards claimed. As to the crops which he claimed to have raised on the land rented of Hudson, there is no proof that he sold any portion of them and realized any particular sum of money for them, and certainly no evidence that he got anything for them, before the money was paid to Owens and Durham to redeem the land.

The conclusion from reading all the evidence in the case is inevitable, that the money which was paid Owens and Durham for the land was furnished by Thomas Surber to his son for the purpose of placing the title in him, to be held for the benefit of the old man. And that the execution of the deed of "*emancipation*," as it is called, to the son, was a preparatory step in the arrangement

to place the property of the father, who was greatly indebted, beyond the reach of his creditors.

Wherefore, the judgment is affirmed on the original appeal, and reversed on the cross appeal, with directions to sell the land in the pleadings described, or so much thereof as may be required to pay Floyd and Ford their debt, interest and costs, and for further proceedings consistent herewith.

Morrow & Morrow, for appellant.

Van Winkle, Fox, for appellees.

J. G. & W. G. THOMPSON v. LUFORD RADFORD.

Pleading—Answer, Sufficient as a Counter-Claim.

An answer, though deficient in not stating the terms of a contract, whether written or oral, where it substantially alleges fraudulent misrepresentations and specified damages resulting therefrom, will be good as a counter-claim.

APPEAL FROM BARREN CIRCUIT COURT.

October 2, 1867.

OPINION OF THE COURT BY JUDGE ROBERTSON:

The answer, though deficient in not stating the terms of the contract nor whether written or oral, nevertheless substantially alleges fraudulent misrepresentations and specified damages as resulting therefrom, and presents a counter-claim; therefore to the extent of this claim the answer is substantially good.

Wherefore, it seems to this court that the circuit court erred in sustaining the demurrer to the answer and thereupon rendering judgment for the amount of the note. The judgment is therefore reversed and the cause remanded for further proceedings consistent with this opinion.

Opinion of the Court.

J. P. MONTGOMERY v. A. ALCORN'S EXOR. AND R. H. GIVENS.

Decretal Sale—Ostensible and Real Bidders—Parties.

Alcorn and Givens having purchased a farm at decretal sale, executed their bond for the purchase price with D. H. Walker as security. Before this sale was confirmed, they sold the land to Montgomery and delivered to him a title bond, reciting that A. Alcorn, R. H. Givens and D. H. Walker were the parties of the first part. The notes taken for the purchase price were made payable to said Alcorn, Givens and Walker; Held; that Alcorn and Givens, by their own acts in giving the bond and receiving said notes furnished strong evidence that Walker was interested and his interest *prima facie* appearing, his heirs should have been made parties to the suit to foreclose.

APPEAL FROM LINCOLN CIRCUIT COURT.

September 22, 1868.

OPINION OF THE COURT BY JUDGE WILLIAMS:

Alcorn and Givens having purchased a farm at decretal sale, made to divide its proceeds among the heirs of A. W. Walker, deceased, executed their bond for the purchase price with D. H. Walker as security. Before this sale was confirmed by the chancellor, they sold the land to Montgomery and delivered to him a title bond with Givens name along subscribed, yet reciting that the "bargain and sale entered into this 28th day of February, 1865, between A. Alcorn, R. H. Givens and *D. H. Walker* of the first part and J. P. Montgomery of the second part."

The terms were \$5,500 paid down and two equal instalments of \$3,644.06 $\frac{1}{4}$ June 28 and December 28, following.

But as the sale had not then been confirmed, notes therefor were not executed until April 4, subsequent to the confirmation, but when executed they were made payable to said Alcorn, Givens and *Walker*; besides, this written evidence of Walker's interest the parol evidence also shows he had some kind of interest in said purchase, Alcorn and Givens therefore by their own acts, in giving the bond and receiving said notes, furnish strong evidence that Walker was interested, notwithstanding the ostensible bid was in their own names and the commissioner's deed was subsequently made to them.

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Walker's interest thus *prima facie* appearing in the purchase, his heirs were essential parties, he having died after the decretal sale and before any order of conveyance was made, and the deed being ordered without their being before the court, we apprehend does not deprive them from their ancestor's interest.

It is insisted that some of the heirs of A. W. Walker were not before the court so as bind them by the decretal sale. But as the judgment compelling Montgomery to pay the two time instalments and to receive Alcorn and Givens' deed, notwithstanding his resistance, must be reversed for the first named error and as time was not made as of the essence of the contract, so as to entitle him to a rescission at once, all these defects may be remedied. As Montgomery went into possession immediately and is still enjoying the use of the farm, and the time of conveying to him was not of the essence of the contract, and notwithstanding considerable delay has already accrued in maturing the vendor's title, yet if they shall proceed with due and active vigilance to perfect their title so as to be able to convey it to Montgomery, he should be adjudged to receive it and pay the outstanding purchase price, but unless this be done the contract should be rescinded upon equitable principles.

Neither the parol evidence nor the writing indicate that either party supposed or intended that the conveyance should be made promptly on December 28, 1865. Indeed, by the terms of the bond, the title was not to be made until the last instalment was paid, and though it was due on that day, its then prompt payment was not secured by the forfeiture of any right and the vendees could not tell certainly that it would then be paid, beside, Montgomery evidently knew they had to get their title by the authority of the court.

Wherefore the judgment is reversed with directions for further proceedings as herein indicated.

Durham & Jacobs, Bell, for appellant.

Harlan, for appellee.

Opinion of the Court.

A. McKENZIE & WIFE VS. E. B. STRATTON, &C.,

Deed of Gift—Mortgage—Infant's Contracts Void—Fraudulent Conveyance.

On the 16th day of May, 1865, Mary Price made a voluntary deed of gift to her infant daughter, Florida Price, of various articles of household furniture and the deed was duly recorded. Afterwards, the mother and daughter executed thir joint note with a mortgage on the furniture to secure its payment: Held, that as the record discloses no evidence of actual fraud in the execution of the deed of gift, and as it was made before the debt of appelle existed, it therefore operated to vest the title to the property in the infant and she had a right to avoid the note and mortgage on the grounds of her infancy.

APPEAL FROM LOUISVILLE CHANCERY COURT.

December 4, 1868.

OPINION OF THE COURT BY JUDGE HARDIN:

On the 16th day of May, 1865, Mary L. Price made a voluntary deed of gift to her infant daughter Florida Price, then residing with her in the city of Louisville, of various articles of household furniture, and the deed was duly recorded.

Afterwards, on the 8th day of December, 1866, while said mother and daughter continued to live together, and were using the furniture at their home, they executed their joint note with a mortgage on the furniture to secure its payment, to Henry C. Sherrill for the sum of \$225, payable March 1st, 1867.

The note and mortgage were assigned by Sherrill to Stratton & Snodgrass, who brought this suit for a foreclosure of the mortgage.

Said Florida Price having intermarried with Augustus McKenzie, they filed their answer, claiming that the property was vested in said Florida by the deed of the 16th of May, 1865, and that she was not bound by the note and mortgage afterwards made to Sherrill, because she was at the time an infant.

It appears that the money realized on the note and mortgage was used to pay a debt of Mrs. Price for rent, for which a distress warrant was levied on part of the property in controversy.

The court dismissed the action as to McKenzie and wife so far

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as it sought to enforce the note and mortgage against them, but held the deed of gift did not operate to convey the furniture to Mrs. McKenzie to the exclusion of the plaintiffs' debt, and adjudged a sale of the property for its payment, and from that judgment McKenzie and wife have appealed.

The record discloses no evidence of actual fraud in the execution of the deed of gift, and as it was made before the debt of appellees existed, and when Mrs. Price was not indebted so far as appears in this case, it cannot be regarded as constructively fraudulent. It therefore operated to vest the property in Mrs. McKenzie, and as she had a right to avoid the note and mortgage subsequently made on the ground of her infancy, it seems to us the court erred in adjudging a sale of the property.

Wherefore, the judgment is reversed, and the cause remanded with directions to render a judgment conformable to this opinion.

Buckner & Wing, for appellants.

Stratton, for appellees.

PERRY WEST v. JAMES B. MASON.**Civil Actions—General Character.**

The rule in civil action is that evidence of the general character of a party to the action, is never admissible; unless the action involves the general character, or directly affects it.

Unlawful Enterprise—Acts and Declarations.

The legal principal governing in cases where several are connected in an unlawful enterprise, when the connection is established by the evidence, is that every act and declaration of each one in furtherance of the original enterprise, and with reference to the common object is, in contemplation of law, the act and declaration of all.

Instructions—Abstract Proposition.

An instruction which contains a mere abstract proposition without reference to any evidence offered on the trial, should be rejected, and an instruction making one isolated circumstance or fact more prominent than other facts and circumstances, should not be given.

Opinion of the Court.

December 16, 1868.

The instructions referred to in the opinion, are as follows:

First.

"If the jury believe from the evidence that the intention of West was to purchase flour and that he was going for that purpose and had no intention of engaging in the alleged taking of the \$400, they should find for the defendant West."

Fourth.

"The fact of West not receiving any portion of the money is a circumstance together with other circumstances elicited in evidence, from which they may infer his innocence."

OPINION OF THE COURT BY JUDGE PETERS:

Mason sued West and Reynolds, charging that they with two Williams wrongfully, and with force took from him \$400 in bank notes, and converted the same to their own use.

A verdict, and judgment having been rendered against the defendants below for \$535, and a motion for a new trial having been overruled, West seeks a reversal of the judgment on three grounds. 1. That the court below erred in refusing to admit on the trial, evidence of his general character.

2. That improper instructions were given to the jury on motion of appellee. Instructions asked for by appellant were refused which should have been given.

3. That the verdict was contrary to evidence. It is proposed to consider these alleged errors in the order in which they are here stated.

As to the 1st objection, the rule in civil actions is that evidence of general character of a party to the action, is never admissible; unless the action involves the general character, or directly affects it. And is never admissible in such actions for injuries to property. 1. *Greenl. Sec. 54, 55 and notes.* This action did not *directly involve* nor directly affect the character of appellant, but was for the restoration of the value of property wrongfully taken, and damages for the wrongful act. The offered evidence was therefore properly refused.

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2. The legal principle governing in cases where several are connected in an unlawful enterprise, when the connection is established by the evidence, is that every act and declaration of each one in furtherance of the original enterprise, and with reference to the common object is in contemplation of law the act, and declaration of them all, and all are equally responsible. Neither of the two instructions given on motion of appellee is in conflict with this principle; but substantially confirms to it, and consequently not erroneous.

The first instruction asked by appellant was properly refused; because it contained a mere abstract proposition without reference to any evidence offered on the trial; there is no evidence that there was any flour for sale, at the place where appellee was found on the night his money was taken from him.

Instruction No. 4 asked by appellant was also properly refused, not only because it is in conflict with the law applicable to the evidence as herein stated, but for the further reason that one isolated circumstance or fact was thereby prominently presented as worthy of controlling influence with the jury, and the expression "*with other circumstances elicited by the evidence,*" left it too general and indefinite.

3. The evidence shows that appellant reached the place, where appellee was, in company with the Williams' & Reynolds, and was present with them when they demanded and took from him his money and note; and was during the whole time armed. Of the sufficiency of the evidence to fix the responsibility of appellant for said acts, it was the exclusive province of the jury to judge, and having determined that question, this court has no legal power to interfere with, or disturb their finding.

Wherefore, the judgment is *affirmed*.

Bradley, Anderson, for appellant.

Owsley & Burdett, McKee, for appellee.

Opinion of the Court.

M. S. WILLIS v. H. S. & J. BIRDSEL AND F. A. & C. A. NOURSE.

Lien—Purchase Money—Suit to Foreclose—Necessary Parties.

Mrs. Jarvis conveyed the legal title to a house and lot, adjudged to be sold, to one M. S. Willis, and upon which F. A. & C. A. Nourse held liens for purchase money, which M. S. Willis undertook to pay as part of the consideration of the purchase. Held, that in a suit to foreclose the lien, the personal representative or heirs-at-law of Mrs. Jarvis were not necessary parties.

Partnership—Disclosing Name of Individual Parties.

Unless the real names of the individual partners to a partnership are disclosed, the creditors will be presumed to have supposed the business was owned by those in control of, and who conducted same, as their individual place of business.

Fraudulent Conveyance—Husband and Wife—Creditors.

O. F. Jarvis and wife, E. C. Willis and wife and J. H. Bryant, were partners in the drug business, and on dissolution, finding they were badly involved, agreed that in consideration of one of the partners assuming to pay (verbally) a debt of \$1,000.00 and \$150.00, respectively, to appellees, O. F. Jarvis and wife executed and delivered to E. C. Willis a deed to a house and lot, the consideration being \$1,150.00, the amount of the two debts the deed being made in the name of Mrs. E. C. Willis. The testimony showed that Mrs. Willis really did not know what the consideration for the deed was, nor what the contract between her husband and Jarvis was, only so far as had been communicated to her by her husband. Her claim of the consideration being \$500.00 she originally put in the drug business is not corroborated by the evidence. Held, that for all the uses of the creditors of Bryant & Co., the husbands of the two feme covert partners must be held liable and that the house and lot must be regarded as the property of the insolvent husband, and the wife holding as his trustee in derogation of the rights of creditors.

APPEAL FROM HICKMAN CIRCUIT COURT.

January 14, 1868.

OPINION OF THE COURT BY JUDGE WILLIAMS:

Mrs. Jarvis having conveyed the legal title to the house and lot, adjudged to be sold, to appellant, and the claim of appellees F. A. & C. A. Nourse being for unpaid purchase price due from Mrs. Jarvis which appellant undertook to pay as part of the considera-

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tion of her purchase, and as these appellees were seeking to enforce their lien, it was not essential to have before the court either the personal representative or heirs at law of Mrs. Jarvis, and we perceive no error as to their judgment.

It is evident that though Mrs. Jarvis and Mrs. M. S. Willis, the appellant, were the co-partners of Bryant in the drug business conducted under the style of J. H. Bryant & Co., yet as the business was controlled by the husbands of these two ladies, and no publication being made to the world who were the real partners, the creditors supposed the firm consisted of Bryant and Mr. Willis.

It is made also to appear that when Bryant & Co. dissolved, the debt to the Birdsels for \$1,000 was then due from Bryant & Co., and it was agreed between O. F. Jarvis and E. C. Willis that the latter should pay this debt and also the debt for \$150 to the Nourses, and the consideration recited in the deed from Jarvis and wife to Mrs. Willis is \$1,150—the precise amount of the principal of these debts, and Mrs. Willis concedes that her understanding was that she was to pay the \$150 outstanding unpaid purchase price to Nourses. E. C. Willis was certainly insolvent and probably O. F. Jarvis was in the same condition, for he seems to have signed the deed to Mrs. Willis and caused his wife to do so, at Mr. Willis' request, without seeing that any lien was retained for the unpaid consideration, and made it to Mrs. Willis when he says all the previous transactions had been in the name of Willis alone, and Mrs. Willis' name was brought in for the first time when he and his wife signed the deed.

Mrs. Willis shows that she really did not know what the consideration for the deed was, nor what the contract between her husband and O. F. Jarvis was, only so far as he communicated them to her, and he seems not to have been very communicative, explicit or accurate as to these. Her account of the consideration paid, that is, the \$500 originally put into the drug store, is not corroborated by the deed or the parol evidence, and is evidently the result of incorrect information or misunderstanding on her part, and as it may be fairly presumed that the family had to be supported mainly from the drug store, it is quite improbable that any profits had accrued to her, especially that her capital had doubled in less than a year, when the firm could not or had not paid its outstanding liability for stock.

It is palpable that for all the uses of the creditors of the firm

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of Bryant & Co. the husbands of the two *feme covert* partners must be held liable, and that this house and lot must be regarded as the property of her insolvent husband, and she holding as his trustee in derogation of the rights of the creditors, greatly strengthened by the moral fact that this was also her debt, although it may not have existed in precisely that shape, that would render her legally liable or subject her general estate.

This view of the subject renders needless any investigation of the mortgage executed by O. F. Jarvis, of this house and lot, to the Birdsels to secure their debt, but which was unacknowledged by him, and unsigned by his wife, the legal title being in her, when the deed to Mrs. Willis was made, though Mr. Willis was informed when he purchased the house and lot that it was so mortgaged, and he then undertook to pay the mortgage debt.

Seeing no error in the judgment, it is affirmed.

Lindsey & Moss, for appellant.

Rodman & Bradleys, for appellees.

ALICE UNDERWOOD ET AL V. D. J. BOWLES ET AL.**Judicial Sales—Lands and Conveyances—Duty of Officer.**

It is the duty of an officer, selling land under judgment to satisfy an existing lien thereon, to disclose to the bidders any incumbrance existing other than that for which the sale is being conducted, in order that bidders might fully understand the character of title they would acquire if they purchased.

Same.

Where such sales occur, the officer, after offering the land to bidders, in a solid lot should attempt, before closing the sale, to raise the amount of the debt by offering a designated side or end of the tract or lot; the defendants in the execution being infants, not present at the sale as must be assumed, and incapable of making the designation, if they had been present.

Judicial Sales, City of Louisville—Officers Discretion.

By section 812, C. C. in the sale of a small portion of real estate in the city of Louisville, and county of Jefferson, if the defendant does not require less than the whole to be sold, where less will produce the

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debt, the officer making the sale may exercise his discretion, with a view to the interest of the defendant, whether to sell the whole, or less than the whole, as he may or not think it advantageously susceptible of division. When the whole is sold by the officer, under the power here conferred, where the defendants are infants, and the officer must exercise the discretion conferred upon him, by reason of their disability to direct how the sale should be made, the facts should be stated in the return.

Same—Purchaser for Value.

An attorney, who admits that he recovered the judgment for the satisfaction of which the land was sold, and was present at the sale, was the surety of the purchaser in the sale bond, and must have known all about the manner of making the sale, cannot be an innocent purchaser without notice of the imperfection of his vendors title.

APPEAL FROM LOUISVILLE CHANCERY COURT.

January 14, 1868.

OPINION OF THE COURT BY JUDGE PETERS:

It appears from the return of the officer who made the sale that the parcel of land, which he sold was "partly subject to the dower of Martha Elderkin," but it does not appear what part, or how much of said land was subject to her dower, nor does it appear from his return that he stated or explained to those present how much of the land he offered for sale was encumbered by the dower of Mrs. Elderkin, which it was his duty to do, in order that bidders might fully understand the character of title they purchased.

The officer making the sale did not offer to sell the land by the acre, or state what quantity was included in the boundary; but it seems that he offered it all in a lot, and is rather to be inferred from his return, when the amount of the execution was bid for the whole boundary, he struck it off, without offering to sell a less quantity off of a designated side or end of the tract and endeavor to raise the amount of money, required to pay the execution, by a sale of less than the whole tract, as it was his duty to do; the defendants in the execution being infants, not present at the sale, as must be assumed and incapable of making the designation if they had been present. Sec. 3, Art. 13, Chap. 36, 1 Vol. R. S. pp. 484.

It has not escaped the attention of the court, that by Sec 812 Civ. C., in the sale of a small portion of real estate in the City of

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Louisville, and County of Jefferson, if the defendant does not require less than the whole to be sold, where less will produce the debt, the officer making the sale, may exercise his discretion, with a view to the interest of the defendant, whether to sell the whole, or less than the whole, as he may or not think it advantageously susceptible of division. When the whole is sold by the officer, under the power here conferred, where the defendants are infants, and the officer must exercise the discretion conferred upon him, by reason of their disability to direct how the sale should be made, the facts should be stated in the return, which is not done.

It is further provided in the section here referred to, that an abuse of the discretion conferred, by the officer, shall be a sufficient cause to set aside the sale.

No special directions were given by the chancellor how the sale under this execution should be conducted. It does not appear from the return of the officer, that he explained how much of the land was encumbered by the dower of Mrs. Elderkin; there is no reason, or at least none is shown, why he did not offer a less quantity than the whole and ascertain thereby whether it would require all to pay the debt; the defendants were infants and could not require it to be done. The land was struck off at less than one-sixth of its value and the sacrifice may be accounted for by the manner the sale was conducted, and the failure of the officer to discharge his duty in the particulars herein named. And the sale should not therefore be permitted to stand.

Nor can appellee Sterman complain. He admits that he was the attorney who recovered the judgment for the satisfaction of which the land was sold, he was present at the sale, and was the surety of the purchaser in the sale bond, and must have known all about the manner of making the sale, so that he is not an innocent purchaser without notice of the imperfections of his vendor's title.

Wherefore, the judgment is reversed and the cause is remanded with directions to set aside the sales to Bowles and to Sterman, and to refer the case to the master to ascertain who is in possession of land for an account of rents, and lasting improvements, and ameliorations on account thereof and for further proceedings consistent herewith. The appellees will have a lien on the land for \$71.21, the amount paid by the purchaser with interest from the 24th of February, 1862, till paid, subject to the adjustment of accounts for rents and ameliorations.

Brown, for appellants.

Sterman, for appellees.

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R. L. COBB & SONS v. JOHN F. BAKER.

Actions—Trover and Conversion—Contract Price Criterion.

In an action of trover and conversion, the value of the property at the time of the conversion, not to exceed the contract price, is the true criterion.

APPEAL FROM CALDWELL CIRCUIT COURT.

January 17, 1868.

OPINION OF THE COURT BY JUDGE PETERS:

While the facts in the petition are not set forth in as concise and direct language as might be desirable, still, all that are necessary to constitute a good cause of action are stated, and the demurrer to the petition was therefore properly overruled.

Johnson certainly stated that appellee said he would as soon take his note for the residue of the price of his tobacco as any man's, but no note was tendered, and from that Groom was instructed positively not to part with the possession of the tobacco until the price was paid, it must be inferred that appellee only meant that if he would take a note at all for the unpaid balance, he would take Johnson's as soon as any man's, but that he did not intend to take the note of any one.

There is no contrariety of evidence that the sale was for cash, on the delivery of the tobacco at the barns of Groom; the tobacco was delivered there, Groom being the agent of Johnson, ready to be surrendered to him when the price was paid, so that appellee did all that he was bound to do to constitute a compliance on his part with the contract.

By the acceptance of the money from appellants on the draft of Johnson, there was no express waiver of any lien by appellee that he had for the residue of the price. Nor does the evidence show that appellants required such waiver, or contracted for the delivery of the tobacco to them upon the payment of the amount of the draft.

The order of appellants to Harris, the warehouse man, was competent to show to whom and by what authority the tobacco was delivered, but the affirmation in the order that they had settled

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with Baker was not competent evidence of the fact of the payment of the price, but the *onus* was on appellant to prove that fact, *aliunde*.

The evidence as to the price of tobacco about the 1st of June, 1865, when appellants received appellee's tobacco, is conflicting, and if there is any preponderance of evidence against the verdict it is not such as to authorize this court to interpose.

Nor is there any available objection to the instruction given at the instance of appellee. The action is in the nature of an action of trover, and conversion, and the meaning of the instruction is that if the jury should find for appellee, they should find the value at the time of the conversion, not, however, to exceed the contract price, which is the correct criterion in this class of actions. The only instruction asked by appellants seems to have been given.

No available error is manifested in the record.

Wherefore, the judgment is affirmed.

Craddock, Slacker, for appellant.

James, for appellee.

J. W. HENSLEY v. JOHN PRINCE.

Slander—Plea of Justification—Introduction of Evidence—Conclusion of Argument.

In an action for slander, the defendant confessed by his answer, the allegations of the petition, that he had imputed to the plaintiff the crime of perjury. Therefore, it was incumbent on him to make out the truth of his justification. The exact form of the words containing the charge were immaterial, so that the substance were proven. Under such state of facts the defendant was entitled to introduce his evidence and then to the conclusion of the argument and this is not relieved because plaintiff introduced his evidence first.

Instruction—Slander—Evidence.

Where there is a contrariety of evidence in an action for slander, the question is one fact peculiarly within the province of the jury, and they should be instructed that if they believe from the evidence, plaintiff denied the malice, but truthfully explained the arrest, its manner, and the part he took in it, they should find for him.

Opinion of the Court.

Same.

Defendant had a right to an instruction predicated on the jury's belief of the evidence presented by him as to his justification, and if the jury should consider this as over-balancing plaintiff's evidence, to find accordingly.

Amended Answer After Evidence Closed—Pleadings.

A defendant may, after the evidence is all closed, amend his answer so as to conform to the proof.

APPEAL FROM LAWRENCE CIRCUIT COURT.

January 23, 1868.

OPINION OF THE COURT BY JUDGE WILLIAMS:

Appellee recovered a verdict and judgment against appellant in an action of slander, for \$1,000, which the court refused to set aside, and from which he prosecutes this appeal.

There was no evidence offered to sustain the action as set out in the original petition, therefore, on a plea of not guilty, the jury were properly directed to find for defendant as to it.

To the amended petition, correctly setting out the action, wherein and before what officer the plaintiff testified, and that of and concerning his evidence in such cause, the defendant charged him with perjury, etc., setting out the words alleged to have been spoken in three several forms, to wit: That plaintiff "swore a n-d unanimous lie," "he swore a n-d lie," "he swore a n-d yellow stinking lie."

The defendant answered denying that he spoke the words as stated in the petition, but he then goes on to state the trial as set out in this amended petition, and that plaintiff was a witness and in his evidence made certain alleged statements which were false and untrue, and that of and concerning the said plaintiff and his oath he did as he lawfully might, say "*that plaintiff had sworn to a lie.*"

The gist of the action was the imputing to plaintiff the infamous crime of perjury, the exact form of the words containing this charge was immaterial, so that the substance were proven.

The defendant confessed that the trial had occurred and that plaintiff had testified as alleged by him, and that defendant had accused him of swearing a lie on such trial, thus confessing he had

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imputed to the plaintiff the crime of perjury; had no witness testified for either party, the plaintiff would unquestionably have been entitled to a judgment on defendant's own answer; therefore, it was incumbent on the defendant to make out the truth of his justification, and hence he was entitled first to introduce his evidence and then to the conclusion of the argument, as provided in sub-division 3 and 6 of Sec. 347, Civ. Code. The court erred in refusing the defendant the concluding argument, and this is not relieved because plaintiff introduced his evidence first.

There was a contrariness of evidence as to what plaintiff did state as a witness on the alleged trial, and whether his denial, when interrogated as to whether he had not maliciously arrested or caused defendant's previous arrest, meant to negative the malice only, or negatived the arrest, the witnesses are not agreed; this question is one of fact peculiarly within the province of the jury, they should have been told, therefore, that if they believe from the evidence plaintiff denied the malice but truthfully explained the arrest, its manner, and the part he took in it, they should find for him. The first instruction given to plaintiff does not correctly present this view; still it has done the defendant no injury, as the error was against the plaintiff. But the defendant had a right to an instruction predicated on the jury's belief of the evidence presented by him as to his justification, and if the jury should consider this as overbalancing plaintiff's evidence to find accordingly, and presented an apt and concise instruction to this effect, which the court erroneously refused, and for this and the refusing appellant the concluding argument, the judgment must be reversed.

The defendant after all the evidence was concluded proposed to amend his answer by inserting certain words to make the pleadings more accurately conform to the evidence, which the court rejected. We would not say this was an abuse of the sound discretion vested in the court, and certainly could not reverse for this, but as the judgment must be reversed for other errors, on the return of the cause the proposed amendments should be allowed as making the pleadings conform to the real case, and in no wise calculated to surprise the plaintiff.

Judgment reversed, and cause remanded for a new trial, and further proceedings in accordance herewith.

Irelana, for appellant.

Moore, for appellee.

Opinion of the Court.

JESSE HAMPTON v. THOMAS H. BLAKEMORE ET AL.

Land—Judicial Sale to Satisfy Lien—Necessary Parties.

A petition for the sale of land to satisfy unpaid purchase money must allege, and plaintiff must show title in some party before the court, who should not adjudge a sale of the land without such an exhibition of title thereto.

APPEAL FROM CLARKE CIRCUIT COURT.

January 8, 1868.

OPINION OF THE COURT BY JUDGE HARDIN:

It sufficiently appears that the note of \$400, dated January 5th, 1863, and asserted by the appellant was executed to him by Thomas H. Blakemore and George N. Blakemore in renewal of a balance of the price of about 121 acres of land which the appellant had sold to them, as commissioner in the suit of Hagan's heirs against Railsback.

This suit though referred to is not copied in this record, and it only appears informally that the title to the land in controversy is vested in some of the parties to that action, who do not appear to have been brought before the court in this. Neither Hampton nor Lisle has shown the title to be in any party before the court, from whom the court could cause it to be conveyed and it seems to us the court should not have adjudged an enforcement of the lien asserted by either party, by a sale of the land without an exhibition of the title with the proper parties before the court to enable the court to cause it to be conveyed.

It seems to us, also, that although the legal title not having been conveyed to the Blakemores or their vendees, the original vendor's lien may not have been waived by the settlement and other acts of the appellant relied on for that object by the appellees, the court could not without the hazard of injustice, determine the question as between the appellant and Lisle as to the priority of him or in fact whether the appellant occupied such an attitude with reference to the title holders and beneficiaries of the sale made by him as commissioner, as to entitle him to any lien at all, without bringing said parties before the court.

Opinion of the Court.

But for the reasons indicated the judgment is reversed without any judgment for costs against either party and the cause remanded for further proceedings consistent with this opinion.

Simpkins & Buckner, for appellant.

Huston, for appellee.

SUSAN HERNDON v. HUSTON & WILLIAMS.

Contracts—Rent—Failure to Take Premises—Criterion of Damages—Burden of Proof.

The price for which property was rented, under a contract, is *prima facie* the value of the use of the property, and the burden of proof is on defendants to show that they could only get for it the amount reported as received by them.

APPEAL FROM UNION CIRCUIT COURT.

February 5, 1868.

OPINION OF THE COURT BY JUDGE WILLIAMS:

If the contract for the renting was complete, and nothing further remained to be done, it is not a little strange that appellant should retain the note for the purpose of getting surety on it, as is alleged in the petition. It was not then ever delivered to appellees as her note, according to their own showing, and the strong probability is, that it was not to be delivered as her note, until the surety signed it, which appellee required to be done in order to perfect the contract.

Moreover, they allege that after appellant declined to take the house, and they were authorized to sub-let it, they could only get \$46.50 for it. The price at which they allege they rented the property to her, exceeded the price they report to have received for it, more than \$100. No reason is assigned for this wonderful difference; and after alleging that they rented to her at \$160 per annum and being authorized by her to sub-let it, the court should not have taken their mere allegation of what they received without proof as the criterion for the credit. The price for which they

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allege they rented to her and which she admits she was willing to give if she could make a satisfactory note, is *prima facie* the value of the use of the property for one year. And the *onus* was on appellees to show that they could only get for it, the amount reported by them.

In either view of the case, therefore, the judgment was unauthorized. Wherefore, said judgment is *reversed*, and the cause remanded with directions for further proceedings not inconsistent with this opinion.

Cissel, Vance & Adair, for appellant.

Huston, for appellee.

W. A. GRIFFITH AND JONES v. W. C. CONWAY.**Land—Sale in Gross—Fraud or Mistake—"More or Less."**

When a vendor knows the tract of land he is selling does not contain the number of acres represented, he cannot shield himself from this presumed fraud or mistake by adding the words "more or less."

Same—Criterion of Abatement.

The true rule is the abatement for the difference in the value of the property as it was at the time of the sale, and as it was represented to be.

APPEAL FROM NICHOLAS CIRCUIT COURT.

February 6, 1868.

OPINION OF THE COURT BY JUDGE WILLIAMS:

Appellant Jones sold to appellee Conway a lot of ground with its improvements, in Hack Foure, representing it verbally and in his deed to Conway, as containing six acres and three-quarters, more or less; it really contained only six poles over 4 $\frac{3}{4}$ acres, and was sold to Jones by Griffith as containing the latter number of acres and so described in his deed to Jones.

The sale by Jones to Conway was in gross, at the price of \$1,200, in four annual instalments, for which notes were executed,

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all of which seem to have been paid but the last, and it had been assigned by Jones to Griffith.

Conway asks that a prorata deduction be made and the court did allow him \$300, and this is the matter in controversy.

As determined by this court at its present sitting in Sharpe vs. Powel, when a vendor knows the tract of land he is selling does not contain the number of acres represented, he cannot shield himself from this presumed fraud or mistake by adding the words "more or less." But the main controversy in this case turns upon the measure of the deduction which should be made, the vendee insisting that he purchased the place as a situation for a blacksmith shop and wagon yard, and that a pro rata deduction of the whole purchase price should be made according to the number of acres; appellants, on the other hand, insist that the improvements constitute the main value and that the land was not worth more than some sixty or seventy-five dollars per acre, and that as the vendee got all the improvements, he is only entitled to a deduction for the value of the land without these.

But as decided by this court in Fall vs. McMurdy 3 Met. 370, neither of these contain the true criterion in cases of town property when the improvements formed the principal element of value, but in such case, the true role is the abatement for the difference in the value of the property as it was at the time of the sale, and as it was represented to be, taking into consideration the location, size and value of the lot, with its improvements, and the purposes for which it was bought and designed to be used. With this criterion, we are not prepared to say the court below erred in the amount of abatement.

Wherefore, the judgment is affirmed.

(See John Sharpe vs. Powell & Adams, page——)

Kennedy, for appellant.

Norvell, Stanton & T., for appellee.

H. M. STRODE v. ELIZABETH STRODE.

Divorce—Application for Allowance—Notice.

Notice of an application for maintenance is not required, where there is a personal service of the summons.

APPEAL FROM CAMPBELL CIRCUIT COURT.

February 8, 1868.

OPINION OF THE COURT BY JUDGE PETERS:

By Sec. 6, Art. 3, Chap. 47, 2 R. S. 21 it is provided that pending an application for *any* divorce, the court may allow the wife maintenance; and as under this provision the court below allowed appellee the sum of \$250 for her maintenance till the next term of the court thereafter, when the action appears to have been tried, this court does not feel authorized to disturb the allowance, as it appears to have been but once made.

Notice of the application does not seem to be required by the statute, there was personal service of the summons, the appellant was in court, the case had been submitted on final hearing, and the submission was set aside on the same day the allowance was made, but upon whose motion does not appear. As, therefore, the allowance was made without objection to the motion for want of notice, and when the appellant was in court, if not in person, by attorney, we cannot say the failure to give notice of the intention to make the motion was erroneous.

Wherefore, the judgment is *affirmed*.

Campbell, for appellant.

Hawkins, for appellee.

JOHN O'TOOLE v. OWEN SHAM.

Evidence—Acceptance of Deed Showing Consideration, Prima Facie Evidence Pleadings.—Deeds.

The admission in a replication to a counter-claim, of the acceptance of a deed, showing on its face a specific consideration, is prima facie evidence of an agreed price to be paid for land embraced in the deed.

Replication—Burden of Proof—Pleadings.

Where a replication states facts, which if proved, would countervail the import of the recital of a consideration in a deed offered by a defendant, and controverts the material allegations of a counterclaim, the burden of proof is on the defendant.

APPEAL FROM KENTON CIRCUIT COURT.

September 23, 1868.

OPINION OF THE COURT BY JUDGE HARDIN:

In this action, which was upon several promissory notes, the defendant answered, alleging in bar of the action, and as a counter claim over against the plaintiff, that after the execution of the notes, and while they were in the hands of Charles Holmes, to whom the plaintiff had endorsed them, and from whom he subsequently took them up, the defendant, who is a marble worker, having an opportunity to sell a monument to John Galvin at the price of \$1,000 to be satisfied in a tract of land in Monroe county, Indiana, at that price,

“it was agreed by and between plaintiff and defendant before said monument was exchanged for said land that the land was to be conveyed by Galvin to plaintiff, who received said land in payment therefor, and was to pay to defendant the difference between the amount of the notes and the \$1,000, the price of the land.”

It was further alleged in the answer that Galvin conveyed the land to the plaintiff, who then paid off said notes, but failed to pay said difference, for which he prays judgment.

The plaintiff replied to the counter-claim and also filed an answer to certain interrogatories annexed to the defendant's answer.

The court rendered judgment for the plaintiff for the notes sued on, to be credited by \$300 for the land, and from that judgment O'Toole prosecutes this appeal.

The deed from Galvin for the land, which appears to have been accepted by the appellee, recites that it was made in consideration of one thousand dollars, and this is the only evidence of the price at which the land was received, or its value, or that of the monument, except the admissions of the pleadings and the appellee's answer to interrogatories. The answers to the interrogatories not being directed by the questions to this particular inquiry, do not materially elucidate it, and we do not regard the reply as evidence. It states facts, however, which, if proved, would countervail the import of the recital made in the deed of the price of the land, and it moreover sufficiently controverts the material allegations of the counter claim, so far at least as they aver facts sufficient to authorize a judgment more favorable to the appellant than that which was rendered; and on the issue thus formed the burden of proof was on the defendant. The appellee having accepted the deed, as he admits in his reply, its recital of the price of the land was against him at least *prima facie* evident that he took the land at the price of \$1000, and in the absence of any competent countervailing evidence, was in our opinion sufficient the judgment rendered is therefore deemed erroneous.

To avoid injustice to either party, resulting from defective preparation which may have been the consequence of a misconstruction of the pleadings, either party will be allowed to adduce further evidence on the return of the cause.

For the error suggested, the judgment is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

JUDGE PETERS dissenting.

Stevenson & Muers, for appellant.

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RILEY M. CALVERT v. N. B. PEARCE ET AL.

Covenants—Bond to Commonwealth for Benefit of Minor Heirs—Sales.

The entering into a covenant to the Commonwealth, by a guardian desiring the sale of property belonging to minors, with security stipulating for the benefit of the infant heirs, a faithful performance of his duties as guardian, and that he would perform the orders of the court, is essentially and lawfully in every legal sense, a bond to such minor heirs and wards separately and collectively.

Married Women—Right to Sell Property When of Age.

A married woman of twenty-one years of age or older, has the right to sell her interest in property descending to her, without a decree of court.

Bond—Sale of Property by Court Without Reinvestment.

When a married woman, over 21 years of age, desires a sale of an inheritance, by order of court, without a reinvestment thereof, but the fund to be placed under the control of her husband, without bond, she will be estopped from attacking the sale thereafter, especially when she had joined her husband in a subsequent confirmation of the title.

APPEAL FROM CALDWELL CIRCUIT COURT.

May 26, 1868.

OPINION OF THE COURT BY JUDGE WILLIAMS:

Calvert is seeking to reverse a judgment dismissing his petition to set aside a sale of purchase by him of two slaves made under a decretal order of the Caldwell circuit court on the petition of James M. Pearce in his own right and as guardian for his minor sister, Cecelia J. and Codelia R. Pearce, Nicholas B. Pearce and N. H. Baily, the husband of the defendant Mary A. Baily. It appears from the petition, answer, commissioner's report, &c., that Allen Pearce and his wife, Mary R. Pearce R, had wards and defendant Mrs. Mary A. Baily, as their only children and heirs-at-law.

That the estate sought to be sold had descended to them from their deceased father and consisted of 200 acres of land worth \$3,000, 9 slaves worth \$5,800, and assets in the guardian's hands of \$800, rent of land worth annually \$100, hire of slaves worth

annually \$420. That Baily and wife were non-residents of Kentucky, and that the answer praying a sale of her interest in the real estate and slaves, and that the same be invested in land and slaves for her, and that her husband be appointed a trustee for her to invest said funds without bond, and she assented to said answer upon privy examination.

Baily and wife were then living in Iowa and whilst the formal prayer is for a reinvestment in land and slaves, the main object was to get the land and slaves converted into money and it placed under her husband's control.

The sale and purchase was made December 27, 1860 and this petition assailing it filed May 2, 1862, and sets up as the only ground for relief, unsoundness of the slave Martha, when the commissioner making the sale recommended her to be sound and so did James M. Pearce, the guardian, and himself an heir, the latter knowing she was unsound at the time.

The defendants answer denying any representations as to the health and denying the unsoundness of the negro, at the time of the sale, and averring that the plaintiff was himself well acquainted with her.

Subsequently an amended petition was filed setting up various informalities in the proceedings and obtaining the order of sale.

Subsequently, in June, 1864, the administrator of James M. Pearce, who had died, and his heirs by their guardian, the other heirs of Allen Pearce, except Mrs. Baily and N. H. Baily filed an amended petition to which Mrs. Baily was defendant, the object of which was to confirm the sale of said property averring that it was not only to their interest to have the sale confirmed, but ruinous not to do so.

Afterwards N. H. Baily and wife and D. J. Baily and wife, she being the Cordelia R. Pearce, tendered said Calvert a deed of confirmation. The court confirmed the original sale and dismissed Calvert's petition. It is now insisted that as there was averment in the petition for a sale, that the slaves were not susceptible of a division in kind, that therefore the sale could only be authorized under article 3, chap. 86, Rev. Stat. 2 Vol. 309, and the amendments thereto, and that it was essential to the validity of a sale thereunder that a covenant to each minor should have been entered into by their guardian with security, and that a covenant to the Commonwealth by the guardian with security stipulating, for the benefit of the infant heirs of Allen Pearce,

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a faithful performance of his duties as guardian and that he will perform the orders of the court, is not sufficient. But we think such a covenant is essentially and lawfully in every legal sense, a bond to such minor heirs and wards separately and collectively, and especially would we hesitate to regard such a bond as insufficient to the detriment of the beneficiaries, either at the instance of a purchaser or an obligor therein. It is also insisted that as Mrs. Mary A. Bailly asked for a reinvestment of her part, to be derived from the sale, in land and slaves, that though she did request her husband to be appointed her trustee and that he should not be required to give bond, still this did not authorize a sale without such bond. In response to this position it may be said that the situation of the parties, her residence then in a free state, and the fact that she desired the funds placed under the control of her husband, indicates her real object as being inconsistent with that statement of the answer. It is very certain at any rate, that she did not desire the court to make the investment, and we are not prepared to say regarding the facts, her situation and her objects, that her case is not within the spirit and provisions of section 540 Civil Code, which renders a bond unnecessary when she is sane and over the age of 21 years, and does not seek a reinvestment. But, however, this may be, it is certain that she and her husband could have sold and conveyed her interest in these slaves without a decree of court, and as that could have been done, we apprehend her consent to the sale on privy examination and the asking that her funds be paid over to the husband without requiring a bond, would bar her and her heirs from any recovery of the slaves, and, therefore, the judgment and sale could not be regarded as a nullity, and more especially as she joined her husband in a subsequent confirmation of the title. And though the negro woman was then dead still this would not only confirm the title to the surviving slave, but so far, as to the dead one, that no recovery from Calvert for the services of such slave could be recovered. Calvert has gotten all he bargained for, in the purchase, the subsequent sickness and death of one of the slaves, and the freedom of the other by the subsequent amendment to the United States Constitution, cannot alter the legal rights of the parties. It is an unfortunate case wherein some innocent party must suffer. Calvert by his own voluntary act took upon himself the hazard of future contingencies and he must abide the loss. The defense of fraud and

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unsoundness is not sustained by the evidence, nor do we understand that it is seriously insisted on. It is not conceded by appellee, in their amended petition, that there were such irregularities as would render the decree of the sale void, nor are we prepared to say so, even without the aid of the subsequent proceeding, but it is very certain that with them the court properly confirmed the sale.

Hence the judgment is affirmed.

Marble, for appellant.

Pepper, for appellee.

H. H. THOMAS VS. WM. THOMAS, ET AL.,

Wills—Mental Capacity—Undue Influence.

Walter Thomas, over eighty years old, desiring to make his last will, applied to his counsel for legal advice as to a disposition of his property. Pursuant thereto, he sent for his son, William, who was living in Illinois, and on his arrival, made, executed and delivered, according to pre-arranged plans, his will, in which the son William was a beneficiary. The father was infirm, had lost his sight, and temporarily at times, prior thereto, had strange delusions as to his own whereabouts, and his mental capacity had greatly deteriorated. It was proven that on the day of making his will, he was perfectly rational, and transacted business of great and grave importance with several gentlemen. His will was made according to carefully arranged plans, his son William not knowing about the matter until receipt of letter requesting his presence, and used no persuasion or even a suggestion to his father as to any provisions in the will. Held, that the donor was of sufficient mental capacity to make a valid and binding will, and no undue influence is shown to have been exercised over him.

APPEAL FROM ALLEN CIRCUIT COURT.

May 30, 1868.

OPINION OF THE COURT BY JUDGE PETERS:

The three grounds relied upon to vacate the contested documents signed and acknowledged by Walter Thomas, dec'd, on the 15th of June, 1863, will be considered in the numerical order in which they are presented in the briefs of appellant.

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First. That Walter Thomas at the date of said instruments had not sufficient mental capacity to make and execute a contract binding and valid in law, and to dispose of his property in a sensible manner.

At the time the contested papers bear date, Walter Thomas was over eighty years of age, in feeble health, and was very nearly, if not totally, blind; in earlier manhood, and up to the time when bodily afflictions came upon him, he was a man of vigorous intellect, possessed of more practical good sense and intelligence than falls to the lot of most men, which had in days past won him honorable distinction among his fellow citizens. The infirmities of four score years, and the disease of the eyes, which deprived him of his sight, had brought the strong man down to comparative helplessness, and dependence upon others, that he had not known in other, and brighter days.

Shut out from the light of this world, and the goal of the pursuits and pleasures of this life having been reached, his thoughts were naturally directed to the contemplation of the best, and most equitable, mode of disposing of what remained of the earnings of his life. And to aid him to arrive at a proper conclusion on the subject, he applied to a man distinguished for his legal ability, and therefore every way qualified, to advise him, which he must have done with the more confidence because an uninterrupted friendship had existed between them for forty years. His objects and intentions were unreservedly expressed and explained to this friend, advice given by him, and Thomas then *decided* to act upon it, and directed his friend to write to his son William, one of the appellees, residing in Illinois, to come to him, in order to complete the arrangement.

In this there was evidence not only of prudence, but of sound judgment and good sense, in view of his relations as husband and father, and his obligations as such.

It is true that the two family physicians testify as to the physical and mental condition of Walter Thomas before, at, and after, the date of said instruments. One of whom states that the deceased "was not suffering for three or four years next preceding his death from any internal organic disease, that he could detect, but a general loss of vigor of the functions of the whole organism, and as the brain is not only one of the most important organs of animal life, but is said to be

the seat of the mind, hence in the loss of vigor of the functions of the brain the mind suffers;" and they both are of opinion that he was not from the infirmities of old age, and decay of intellect, of sufficient mental capacity to transact important business, and to make a prudent disposition of his property, at the date of said instruments.

Several other witnesses state facts showing that the memory of decedent had greatly failed, and that he at times labored under strange delusions, at one time imagining that there was an excrescence on his lips, at other times that there was a preternatural substance in his mouth, which would prove fatal to him, if it could not be removed, and at other times he would imagine that he was away from home, and could not be comfortable until he could be taken back, and no persuasion or assurances of his friends, and those around him, could convince him of his error. But on the day the instruments were executed, three gentlemen were at his house, saw him, and conversed with him. One of them, a Mr. Cox, went there to get his deposition to be used as evidence in a suit to which he was a party; his deposition was taken. Cox and Mansfield, the examiner who wrote out the deposition, both prove he fully comprehended the business he was engaged in, gave a comprehensive, connected, clear and intelligent statement of the facts to which he was deposing, and Cox says a truthful one, stating the facts just as he had narrated them to him years before; that he had called to see him the evening before to inform him he desired to take his deposition the next day, and he then found him intelligent, as his conduct and conversation showed. Mansfield proves he had known him from 1839; that he was then a man of strong mind; that when he took his deposition for Cox he comprehended the questions propounded to him and answered them readily and intelligently, and although feeble in body, he appeared as rational as any man of his age he ever saw, and exhibited no want of intellect that he could detect.

Carpenter, the clerk of the Allen county court, proves he knew the decedent well, lived within 200 yards of him for two years before his death, took decedent's acknowledgement of the deeds in question, and on the day they were acknowledged, that from his long acquaintance with decedent, he was at the time competent to the transaction of the business. There is no evidence in conflict with the evidence of these witnesses as to the mental condition of Walter Thomas on the day of the signing and acknowledging

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of said instruments, and we are constrained to conclude, that although the fading tabernacle of Walter Thomas was soon to be forever removed from the sight of men, the deeds are the offspring of a mind fully able to comprehend the business it was engaged in, the relations and obligations the donor bore to others, and his duties to them.

On the *second* ground or undue influence but little need be said; there was no possible chance for such influence to be exercised by any one except William Thomas—there is no evidence that he ever uttered a word or made an effort to induce his father to dispose of his property in any way whatever. The wish had been expressed by the decedent to make disposition of his estate in a way to meet his views to Judge Underwood when William Thomas was in another state, and the whole subject discussed, considered, and finally concluded upon, before he knew anything of it, and the first information he had on the subject was in a letter addressed to him by Judge Underwood, in which his father's wishes, and the mode agreed upon, as the most practical, to carry them out, and he was requested to come to the residence of his father to consummate the business; he came, and it was attempted to be done, through him, precisely on the plan suggested by Judge Underwood, and adopted by his father in his absence, and wholly without his instrumentality. That ground, therefore, is not made out. Nor can the last be made more available. The provision made by decedent for his wife was at the time reasonable and just, in view of the condition of his children, and the claims they had upon his bounty.

The precise value of the personal estate given to his wife is not definitely shown, but with the \$300 in money which is given her, may be assumed to amount to \$800; the annual value of the real estate, in and near Scottsville, may be estimated at \$200, and the annuity of \$60 secured to her will produce to her more, annually, than the one-third of the whole estate of her husband, while the real estate is continuing, and of a permanent character, the money is less secure, and more difficult to manage. But if she could have been able to have retained the slaves given to her, would have been much greater than the one-third of the whole estate of the decedent, and we have already seen her annual income is now as much as it would have been on the one-third of the whole, to which she would be entitled. Under these circumstances, and

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in view of the fact that she had no children by her marriage, with decedent, and that he had a number of children and grandchildren, some of whom were very poor, we cannot say the deeds are within the prohibition of the statute.

Wherefore, the judgment is affirmed.

Dickey, Leslie & Botts, Gatewood, for appellant.

Underwood, for appellees.

M. L. VANADA ET AL v. JOHN R. KASS ET AL.**Color of Title—Fraudulent Assignment—Possession of Land Under.**

The possession and occupancy of lands under color of title, will give no rights thereunder to the holder of the premises, where the title thus asserted is procured by a fraudulent transfer.

Lands and Conveyances—Original Survey—Assignment of—Fraudulent Conveyance.

An assignment of an original survey to a large tract of land, on a copy of the original, was made and afterwards the lands were patented to the assignor. The assignment was without consideration and at a time when the assignor was seeking to absolve himself of a large obligation on a bond of a defaulting sheriff. Held, to be a fraudulent transfer of title, though the assignee acquired possession of the lands after the death of the assignor.

APPEAL FROM LIVINGSTON CIRCUIT COURT.

May 23, 1868.

OPINION OF THE COURT BY JUDGE HARDIN:

The appellants, the heirs at law of Solomon Vanada and William Briscoe, deceased, who were residuary devisees of John Kass, who died about the year 1826, brought this suit in equity against John R. Kass and others, the heirs of William Kass, deceased, to compel a conveyance to the plaintiffs of a tract of about 170 acres of land patented on the 23rd of August, 1822, by the Commonwealth of Kentucky to said William Kass, assignee of Matilda Dodd, in consideration of a certificate of survey to said William Kass as

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assignee as aforesaid, dated the 15th day of August, 1817. The plaintiffs founded their claim on the following assignment endorsed on a copy of said certificate, which William Kass is supposed to have held the original on which the grant was subsequently issued to him:

"I assign the original survey, of which this is copy, to John Kass for value received.

June 11th, 1822.

"WILLIAM KASS.

"Test: Enoch Prince."

It is alleged in the petition that notwithstanding said assignment, William Kass afterwards obtained said patent wrongfully and without John Kass's consent.

John R. Kass defended the action, denying the execution of said assignment, and charging that if made at all, it was without consideration, and in pursuance of a fraudulent arrangement between said John and William Kass to secure the property of the latter from his liability as one of the sureties of a defaulting sheriff, and that the possession of the land was not delivered or recognized under said assignment. He also relied on the lapse of time and length of possession adverse to the plaintiffs' claim in bar of the action.

The execution of the assignment is sufficiently proved, but the evidence conduces to the conclusion, also, that it was made without consideration and for the purpose alleged in the defense. John Kass, who was a brother of William, and an unmarried man, appears to have resided with his brothers at the time, and to have had but little means, and although he seems to have claimed his brother's land under some assignment or transfer, he appears to have acquiesced in a statement made by James Ford, as proved by the witness Canada, that there was no consideration for the assignment. The failure to transfer the original certificate of survey instead of a copy, and the neglect of John Kass, while he lived, to assert his claim by any proceeding, although during that time the patent was issued to William Kass, are circumstances tending strongly, also to sustain the charge that the assignment was a mere device, and fraudulent alike on the part of both John and William Kass.

Although the land in controversy remained in an unimproved state for many years, William Kass, who resided on the adjoining tract, seems to have claimed it and exercised acts of ownership over it until his death, which occurred about 1832. The first

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actual occupancy of the land was under the title of William Kass in 1852, and though the appellants seem to have gotten some possession or control of the land afterwards, they appear to have done so illegally, or by collusion with a tenant of the appellees, and there is evidence tending to show the possession was afterwards in a tenant of the appellees.

The court below dismissed the action, and the plaintiffs have appealed to this court.

Whatever might have been the effect on the rights of William Kass of the fraud intended to, he perpetuated by the assignment to John Kass, and if under color of said assignment the latter had acquired the title or possession of the land, we are of the opinion that said transaction gave John Kass no rights which, on the state of case presented in this record, could entitle the appellants as the heirs of his devisees to recover in this action.

Wherefore, the judgment is affirmed.

James & John W. Bush, for appellants.

MEVERILL MCGILL ET AL v. J. M. NELSON ET AL.

Wills—Devise—Residuary Legatees—Executors and Administrators.

A will which provides "that one-twelfth of my property or proceeds arising therefrom to be taken possession of by the administrator, and held in trust for the use of my daughter during her life, and pay her yearly what may be deemed reasonable for the use thereof, and at her death, the principal to be paid to her children" is held to provide for the legatee alone, during her life, from the product of the trust funds, and she would have no right to consume the principal, and a loan to her by the administrator of a portion of said principal, was a misappropriation, for which he could be held liable.

Pleadings—Allowance for Disposition of Trust Funds Without Allegation in Petition.

An allowance by a commissioner of a credit for administration of the principal of a trust fund, against the account due the residuary legatee thereof, without necessary allegations in a cross petition by an adverse party, that said fund should be charged against said devisee, is radically erroneous.

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Judgment—Erroneous as to Representatives of a Defendant Intestate When Not Before The Court.

A judgment rendered in a suit, in which an intestate was a party thereto, is erroneous, when the representatives of the deceased are not brought before the court.

Pleadings—Answer—Appearance.

An answer signed by one of the devisees of a trust fund, reciting that all three devisees were respondents, is not an appearance for all.

Administrators—Settlement—Life Estate—Surrender to Residuary Legatees.

Where a surrender of a life estate to her children, is made by a legatee, a settlement should be adjudged up to said surrender, in a suit against the bondsmen of the administrator for an accounting.

APPEAL FROM NELSON CIRCUIT COURT.

May 28, 1869.

OPINION OF THE COURT BY JUDGE WILLIAMS:

William Muir having departed this life, his will was admitted to record November 12, 1838, that part of which involves this litigation is as follows:

“And, whereas, William McGill of Bracken county, on or about the month of January, 1829, died insolvent, and it is feared my daughter Mary S., his widow, is answerable for her husband’s debts so that what I could leave her would be attached by her husband’s creditors and she and her children left to suffer, to prevent which it is my will and desire that my executors take possession of one-twelfth part of said property, or proceeds arising therefrom as here directed, in trust for her use during her life, and pay her yearly what may be deemed reasonable for the use thereof in such commodities as said Mary may stand in need of, and at the expiration of said Mary’s life the principal to the children.”

Jonathan Wood Wilson was the only executor who qualified.

Wilson’s sureties in his executor’s bond having moved for counter security, P. B. Muir, in pursuance of an order of the court, became his surety in a new bond, June 11, 1860, and to secure Muir against loss by reason of said suretyship, J. Wood Wilson executed to him a mortgage on his property, dated January 17, 1862, expressly setting out his liabilities to Mrs. Hite and Mrs. McGill.

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January 13, 1858, J. Wood Wilson made a settlement with the county judge of his accounts as trustee for Mrs. Mary S. McGill, and showed a balance as trustee under said bequest of her father then in his hands of \$345.53. He had originally in his hands as trustee under said bequest of her father \$964.48-100, but had loaned to her of it \$541.87 $\frac{1}{2}$.

He was also guardian for James Cotton, and James M. Doon was surety in his guardian's bond.

J. Wood Wilson having died, W. W. Metcalf was appointed guardian in his stead, who brought suit thereon against said Doon, Muir and Nelson's heirs, and attacked said mortgage, by Nelson to Muir, as having been made in contemplation of insolvency and as coming within the statute of 1856. And in an amended petition, filed August, 1862, he made Mrs. Mary McGill and her two children by name, now appellants, defendants, who were served with process August 25, 1862.

The parties interested by petition, amended petitions, answers and cross-petitions, all interpleaded.

The record shows that Mary S. McGill *filed answer and reply to the cross petition of J. M. Wilson.*"

There is found among the papers, but not marked filed, an answer with the name of Mary S. McGill attached to it, which begins as follows:

"Thé defendants, Mary S. McGill, Meverill McGill and Elizabeth Foxworthy, late McGill, with her husband, Peyton Foxworthy, *for answer herein say.*"

They then proceed to aver the possession of two slaves by J. Wood Wilson, which he had delivered over to Mrs. McGill, also \$964.48 in funds of the trust estate of February 13, 1847, and the loan by him to her of \$541.87, and also his settlement with the county judge showing a balance in his hands of \$345.53, and surcharged one item of \$48.22 as erroneous therein, and pray that it be corrected.

They also concede that J. Wood Wilson had purchased the interest of Alexander and William M. McGill in the trust estate.

The transfer of Alexander and William McGill are made exhibits and are not disputed; these show that after said settlement they sold to said trustee for a valuable consideration.

Mrs. McGill by a writing filed with the answer relinquished her

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life-time interest in this fund, but it seems not to have her name attached to it.

Her death is subsequently suggested of record, and the case without further pleading by her surviving children, now appellants, proceeded to trial.

The case was referred to G. W. Hite, as master, to report the liabilities of J. Wood Wilson to the respective parties. In his first report, which is marked filed, he seems to have pretermitted the McGills. It was subsequently referred again to him to report and a paper, not marked filed, is found among the papers purporting to be his report, in which the accounts with the McGills are stated, by which a balance is ascertained to be due from his estate of \$245.68, a credit for the interest bought of the boys being allowed.

A decree was rendered in this case March 31, 1865, by which the mortgage to Muir was upheld, and among other things two hundred and twenty-six 23-100 dollars was adjudged to Meverill McGill and Mrs. Foxworthy and her husband.

May 20, 1865, said appellants brought this suit with a view of reviewing and correcting the errors of said judgment apparent from the papers and record therein, and for the many irregularities perpetrated in the proceedings.

To this J. Wood Wilson's heirs answered, controverting the cause of action and insisting upon the various settlements and pleading said judgment in bar.

The court dismissed this petition upon final hearing, as they ask a reversal.

The only serious question is as to appellants right to have said cause reviewed.

Mrs. McGill was entitled alone to the products of the trust fund. She had no right to consume the principal and the loan to her by the trustee of the larger portion of it was a misappropriation of it.

These appellants did not approve it by any pleadings in the case, for the answer signed by her seems to have been filed alone as hers and although it sets out the appellants as respondents, it was not signed by them nor does the record show that it was filed as any one else's answer but hers.

There was no pleading by any of the plaintiffs or by Muir charging that the fund loaned by J. Wood Wilson to Mrs. McGill should be charged to her children, and it may perhaps be inferred

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that the two boys' interests purchased in this note from him in the transfers of their remainder interest after the expiration of their mother's life estate; if so, to again allow it by way of reducing appellants claim would be to pay him twice for the same thing, but the radical error consisted in allowing it at all against appellants, without allegation by any adverse party and without any express consent on their part.

And although Mrs. McGill surrendered her life interest in the trust fund to her children, yet a settlement up to such surrender should have been made between the trustee and herself which was neither waived nor their accounts stated, and for this purpose her representative after her death should have been brought before the court, which was not done.

For the substantial errors to appellants prejudice and the numerous irregularities in the proceedings, said judgment should have been reversed and the errors corrected.

Wherefore, the judgment dismissing said petition is reversed, with directions for further proceedings as herein indicated, with leave to either party to amend and bring before the court any essential party to a full and fair adjudication of the matters in controversy.

Judge Hardin not sitting.

Johnson, for appellants.

J. G. Wilson, for appellees.

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J. N. OUTTEN ET AL V. C. C. SMITH.

Rent—Implied Agreement for Legatee's Liability for Rent.

The use of lands for a long period of time by a legatee with full acquiescence and knowledge of the other devisees, in the absence of any agreement or promise to pay rent therefor, will not subject them to an indebtedness for the use of the premises by implication, in a suit for a division.

Lands and Conveyances—Partition—Lien.

Where an estate has been devised and one of the legatees has the use of the property, with the acquiescence of the others, in an action for a partition, the value of the improvements on the land at the time of the death of the intestate, should be ascertained, and one half charged to the legatee in possession, to be a charge upon the half of the landed estate as may be set apart to them.

Commissioners Report—Consent Reference by Parties—Acceptance of Report.

A consent reference, by the parties to a suit, to the appointment of commissioners, will not bind the defendants to an acceptance of the report to an unequal division of the property, and liability of defendants for rent and improvements on lands, as adjudged against them by the commissioners.

APPEAL FROM UNION CIRCUIT COURT.

February 7, 1868.

OPINION OF THE COURT BY JUDGE PETERS:

In 1843 James B. Smith owned the land which is the subject of this suit and was living upon it; he was a single man, and never was married; early in the year his health failed him, and Mrs. Outten, a widowed sister, with four children, went to his house to nurse him; in March, 1843, Smith died, intestate, leaving his sister, Mrs. Outten, and the appellee, his brother, his only heirs at law. After his death Mrs. Outten remained on the land with her family until her death in 1858, and appellants J. N. Outten and Mrs. Delaney, her only surviving children, continued to live on the place after her death, no partition having been made.

Shortly before January, 1866, appellee manifested an intention

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to have the land divided, and threatened to do so by running a line through it east and west, and in January, 1866, appellee brought this action for partition. Commissioners were appointed to make partition, and to report the same to court; the commissioners were agreed upon, and the court approved them.

They reported that the tract by survey contained $245\frac{1}{2}$ acres, and that they had divided it, assigning to appellee $135\frac{1}{4}$ acres, and to appellants $110\frac{1}{4}$, including the improvements which were put on the land by intestate, and the same that had been occupied by appellants and their mother; to this report exceptions were taken, but they were overruled by the court, the report confirmed, and conveyances ordered accordingly; and from that judgment Mrs. Outten's heirs have appealed.

From the evidence of Buckman, it appears that the commissioners, of whom he was one, estimated the value of the improvements on the land at the death of J. B. Smith in 1843, and gave to appellee the one-half thereof in land, estimating the improvements at \$400, and paying him the one-half thereof in land, valued at \$5 or \$6 per acre, and charged appellants rent on 48 acres which they had cleared and which they assigned to appellee for the whole time they cultivated it, and allowed them credit for the cost of clearing the same; leaving a balance of \$174.67-100 in favor of appellee for rent; he also proves that the $135\frac{1}{4}$ acres of land given appellee, are "now worth a great deal more than the 110 acres given to plaintiffs;" but the precise difference he does not state. The reason assigned for this inequality is that the order of reference was by consent of parties, and points out the duty of the commissioners—or rather what they shall do. But if it be conceded that the consent order is to be construed to a consent as to what facts the commissioners should ascertain and report, it does not amount to a consent or agreement by appellants that they would pay the amount of rent that the commissioners should report against them; or that they would pay for improvements made by intestate in land at its value in 1843. No such agreement is expressed in the order, nor do the words import it. The division is unequal, as is proved, and that part appellee gets by it worth a great deal more than that appellants get; it was made on a wrong basis, and a misapprehension of the order appointing the commissioners, and cannot be approved by this court.

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From the long acquiescence of appellee in the occupancy of the land by his sister and her children, he living in the immediate vicinity without ever claiming rent, or an intimation that he intended to do so, indicates very strongly that it was not his purpose, and in view of the relation of the parties, their circumstances, and the length of time appellants and their mother occupied, no agreement or promise to pay rent, or an indebtedness therefor, will, or can, be implied.

But the value of the improvements on the land at the time of the death of intestate should be ascertained, and the one-half thereof appellants should be required to pay to appellee, and in case of their failure to pay the same, it should be a lien on their part of the land, the land to be estimated at the present value; and as appellants are not charged with rents, they should not be allowed anything for improvements.

Wherefore, the judgment is reversed, and the cause remanded, with directions to divide the land equally between appellants and appellee, according to quantity and quality, appellee to have one-half thereof, and appellants the other half, to be laid off so as to include the improvements put on the land by intestate, J. B. Smith, in appellants' part, the one-half of the value of which they are to pay to appellee, and for which half of the value he may have a lien on the land, and for further proceedings not inconsistent with this opinion.

Lindseys, for appellants.

Huston, for appellee.

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ANDREW BROADUS v. JAMES TUGGLE ET AL.

Pleadings—Defective Petition Cured by Necessary Facts Stated in Answer Cause of Action.

Where a petition is not good for failure to set forth with certainty the particular execution a sheriff had in his hands, of a replevy of property thereunder, failure to take sufficient surety in the bond, etc., it is cured by an answer that specifically describes all the details in connection therewith, and the petition and answer together, will be sufficient to constitute a cause of action.

Pleading—Judgment Creditor—Actions—Officers Negligence.

The effort of a judgment creditor to make his debt by causing another execution to issue, after the sheriff failed to execute the former one, will be no defense for the officer to an action against him for his official delinquencies.

APPEAL FROM KNOX CIRCUIT COURT.

OPINION OF THE COURT BY JUDGE PETERS:

If the petition of itself should not be regarded as good, for failing to set forth with certainty what particular execution appellee had in his hands as sheriff of Knox county that was replevied and he failed to take sufficient surety in the replevin bond, or what executions he failed to return, the answer furnishes the remedy, and cures every defect by specifically describing them, and the two together stated all the facts necessary to constitute a cause of action.

In reply to the ingenious argument made by appellee's counsel that there is no allegation in the petition that the defendants had no property in the county liable to the execution, by reference to the answer it will be found to supply the omission *beautifully* as follows:

Defendant says, "That during the time he had said 'execution' (referring to the last one which issued on the replevin bond and was placed in his hands) he notified John G. Eve, the attorney for the plaintiff, that he had the same, and told him that if he levied it on the property of the defendants in the execution he could get no bidders, and wanted said attorney to go and bid for the same, and he refused and said he did not want the property, and in

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consequence thereof he did not make the levy and return the same."

And in another paragraph of the answer it is said the defendant had sufficient property to make the debt when the execution was in the hands of King, the successor of Tuggle, as sheriff of Knox county.

The efforts of appellant to make his debt out of the defendants in the execution by causing others to issue after appellee failed to make it, found no defense to the action against appellee for his official delinquencies while he had the execution in his hands. And the instruction asked for by him should have been overruled.

Wherefore, the judgment is *reversed*, and the cause remanded, with instructions to award a new trial and for further proceedings consistent with this opinion, either party, or both, should be permitted to amend their pleadings, if they ask to do so within proper time.

Burnam, for appellant.

James, for appellee.

E. W. SMITH v. S. & A. JACKSON.**Executory Contracts—Pleadings—Cross Petitions.**

A transfer of an expectancy by heirs of an estate must be alleged by cross petition, in a suit by the holders of these equities to enforce same as against one of the legatees, it being a contest between equities as to which litigant is entitled to the legal title.

Same.

The vendee of the executory contracts after the death of the vendor, does not become possessed of the legal title to the lands embraced in the contracts executed by the heirs, but holds a mere equity

Title Bond—Resulting Trust—Expectancy.

A father who holds the bonds of his children to convey to him their expectancy to be derived from the estate of their deceased mother, transferred said bonds by assignments to his son. In a suit to enforce the executory contracts, the father, though not being possessed of the legal title to land, and having agreed not to dispose of his equity, with notice to his vendee, the legal title cannot be coerced at the instance of the heirs so as to defeat the equity of the purchaser of their expectant interest, by a third party. They are deemed, in equity by their bonds, to be the holders of the legal title in trust for their father during his life, and with remainder to their vendee, at his death.

Multiplicity of Suits—Consolidation of Actions.

Several suits growing out of and connected with the same subject matter should be consolidated, and settled in one suit.

Cross-Petition—Answer by Defendants—Waiver of Right to Question its Legal Form.

An answer as to its merits to a cross-petition, (that sets up a cause of action), by the defendants, without having demurred or moved to dismiss same, is held to be a waiver of any subsequent right to do so. It must be treated as part of the whole suit.

Vendor and Purchaser—Bona Fide purchaser of an Expectancy.

The purchaser of an expectancy by a vendee, with knowledge that the interest of the claimants who had sold by executory contract to his vendor, held only a resulting trust, assigned to a third party, to take effect, at the death of his vendor; is held not to be a bona fide purchaser, to defeat the repayment of the amount thus paid for the expectancy of the heirs, by such third party.

Opinion of the Court.

APPEAL FROM OWEN CIRCUIT COURT.

June 22, 1868.

OPINION OF THE COURT BY JUDGE WILLIAMS:

The deceased wife of Simon Jackson inherited from her deceased father a joint interest in a tract of some 400 acres of land; this interest was never set apart to her, but after her death was partitioned to her six children, Mrs. Smith being one of them.

One of these children died intestate after arriving at majority.

Simon Jackson purchased by executory contract the interest of four other of his children in the tract of 96 acres, which had been assigned them, and claimed to have purchased Mrs. Smith's interest by parol.

This suit was brought in the joint names of Simon and Andrew Jackson, setting out said purchase, and that Simon had sold by executory contract all his land, including this 96 acres, to said Andrew Jackson, also for other purposes not necessary to be stated.

Smith and wife answered, denying the parol purchase of her interest; also averring, by Smith, that by the consent and assurance of Simon Jackson, that he would die intestate and neither sell nor devise his land and let them descend to his heirs at law, he had purchased from several of Simon's children and grandchildren their expectancy in his lands, and filed the covenants of said several heirs expectant, and made this a cross petition against both Simon and Andrew Jackson, averring also that Andrew had full notice of these things, notwithstanding which by undue influence, fraud and over-reaching, he had procured a contract from his aged, infirm and incompetent father, by which he was to leave all his lands, and prayed a conveyance of the interest of his vendees, and if he could not get the land, then a judgment against Simon with a lien upon the land for what he had paid, and a judgment of sale, averring that if Andrew got the land the old man would be insolvent. The court on hearing directed a partition to Mrs. Smith of her interest, and dismissed Smith's cross petition without prejudice, deeming the cause of suit as therein set out as improperly litigated by cross petition.

Smith seeks a reversal of this dismissal of his cross petition.

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As to the 96 acres assigned to the children as heirs of their deceased mother, Simon Jackson had never become possessed of their legal title, save as to the one who died intestate and of full age, but held a mere equity, the legal title still being in the children; therefore, when he consented that they might sell not only their expectant interest in this but his other land, and they did so sell by executory contract to Smith, he having obtained the memorandum in writing, it is a contest between equities as to which should be entitled to the legal title, and it was not only proper, but essential, for Smith to set up in this litigation his equitable claim.

His petition sets out an equitable cause why the legal title as to this 96 acres should not be adjudged to Andrew as purchased from his father, because, whatever might have been the rights of the parties, had Simon been possessed of the legal title, yet as he was not, and if his vendee had notice of his consent for them who held the legal title to sell, the legal title should not be coerced at their instance so as to defeat the equity of the purchaser of the expectant interest.

As to this tract of land, Simon holds the bonds of his children to convey to him and Smith holds their bonds to convey to him, after Simon's death, and these later bonds being executed subsequent to the bonds to Simon, and by his consent, these children must in equity be deemed as holding the legal title in trust for Simon during his life and remainder to Smith, and the chancellor should have so adjudged, unless Smith should seek to cancel the contract and go for the return of the money with interest.

But as to the other lands, Simon Jackson not having consented to the sale in writing, and Smith's vendors not being possessed with the legal title, the contract cannot be specifically enforced, but the whole case should be litigated and settled in one suit, as the subject matter is so connected and interwoven as to make it highly improper, if not impossible, to separate and adjudicate it in different suits; nor is there anything in Sec. 124 Civ. Code, and its amendments to preclude this, but these together with Sec. 126 indicates the legislative intent to settle all connected matters in one, instead of a multiplicity of suits. But if this were not so, the defendants in the cross-petition answered as to the merits without having demurred, or moved to dismiss it and thereby waived any subsequent right to do so, if it set out a cause

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of action. Simon Jackson should be held responsible for the return of the money to Smith, paid by him to his vendors for their expectancy so far as he does not get the land together with interest thereon, and Andrew Jackson having procured from the old man a sale of all his property, with full knowledge of this liability, should not be regarded as a *bona fide* purchaser without notice and permitted thus to defeat the collection of the claim, but having gone into equity the chancellor should compel him to do equity before he is invested with the legal title.

The dismissal of Smith's cross-petition was erroneous in any view of the subject, and it is, therefore, reversed, with directions for further proceedings as herein indicated.

Lindsey, for appellant.

Scott, for appellee.

ZACHARIAH ELLIOTT v. W. T. FINCH'S ADMR.

Vendor and Purchaser—Accounting for Waste—Rescission of Contract of Purchase.

In a suit to enforce a purchase money lien, where the vendor fails to make or offer to make a good and valid deed of conveyance, and the vendees demand and secure a rescission, of the contract of purchase, they having gone into possession of the property at the time of the executory sale, they must be held for waste committed, rents and profits, while the property was retained by them, subject to an allowance for permanent and lasting improvements to the extent of ameliorations at the time of the return of the property.

Specific Performance—Vendor and Purchaser—Duty to Pay off Existing Lien by Vendee.

It is not the duty of a vendee to seek out and discharge an existing mortgage on lands purchased from the vendor, though there may be due to the vendor an amount equal to the amount of such mortgage. The vendor must tender a deed free from incumbrance, before he can enforce a specific performance of contract with his vendee.

APPEAL FROM BALLARD CIRCUIT COURT.

May 22, 1868.

OPINION OF THE COURT BY JUDGE PETERS:

Although the action was brought in ordinary, and the collection of the debt sought to be coerced by attachment, afterwards it was transferred to equity. And by an amended petition a lien was claimed on a tract of land for the debt, and its enforcement sought to satisfy the same; but it is not alleged in any of the pleadings, that appellant, who is the vendor, had made to his vendees a title to the land contracted to be sold to them, nor that he was able, willing, and had offered to make the conveyance. He was not, therefore, entitled to the relief sought, as has been repeatedly decided by this court by an enforcement of his lien and a sale of the land. But if the petition had contained the necessary allegations it appears in the record that he had no such title to the land, as his vendee was bound to accept. A considerable part of the purchase price was due and unpaid to the vendor, and besides he had further incumbered it with a mortgage for a large debt, comparatively to the value of the land, and while it may be true that appellant's vendees owed him more than enough purchase money to pay the mortgage and remove all liens, still it was not their duty to hunt up his creditors, and negotiate and satisfy their claims, and afterwards adjust them with him, with or without litigation as the parties might, or not, agree. No error is, therefore, perceived in setting aside the contract of sale. But it appears that appellees took possession of the lands and mills very soon after they purchased, in the summer of 1859, and retained them until the rendition of the judgment complained of; indeed, it is not shown that they have not the possession even at this time, and by the judgment they are not required to account for rents, use, waste or profits, for any time that they had the use of the property. Appellant sought by motion to have a receiver appointed to take charge of the property, but his motion was at first successfully resisted, and although at a later period upon a renewal of the motion, it prevailed, yet it does not appear that the purchasers surrendered it to the receiver.

Upon the rescission of the contract the parties should be placed as nearly *in statu quo* as they can be, and in order to do that, appellees should have been required to account for rents and profits, and for waste committed while they retained possession of the property, and been allowed for all permanent, and lasting

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improvements made by them to the extent of ameliorations at the time the premises were returned.

For the failure to take an account between the parties as herein suggested the judgment is *reversed*, and the cause remanded for further proceedings in accordance herewith.

Bullock, for appellant.

BENJAMIN MOURNING v. H. H. STRATTON ET AL.

Lien—Exchange of Mortgage Notes for Notes Unsecured—Substitution.

Although the simple exchange of mortgage notes given for the purchase price of real property, for those of a stranger, and which were unsecured, might prima facie imply a waiver of the lien, the fact that the mortgage made the exchange for the accomodation of the mortgagor, who had either removed or was about to remove to another state, and was in doubtful circumstances, and the strong probability that the mortgagee would not otherwise have received his note unsecured in satisfaction of notes amply secured by lien, would repel that presumption and authorize the conclusion that the parties intended a mere substitution, which would not extinguish the lien but only change the debtor and the evidence of the same debt.

Same—Notice—Fraud—Trust.

A party purchasing lands with actual or constructive notice of a trust existing in his vendor, though not of record, acquires no right beyond that held by such vendor, and any attempt to pass an unincumbered title with such notice, would be fraudulent.

APPEAL FROM ANDERSON CIRCUIT COURT.

May 23, 1868.

OPINION OF THE COURT BY JUDGE ROBERTSON:

On the 11th of December, 1859, Thomas Montjoy conveyed to Lorenzo D. Wiggs a house and lot in the village of "Rough and Ready," Anderson county, Kentucky, reserving a lien for a recited balance of the consideration, for which he held notes on *Wiggs* for about \$400, thus secured and yet unpaid, and which he sold and assigned to the appellant, Benjamin Mourning, before the year 1864. In February, 1864, *Wiggs* made an executory sale of

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the same house and lot to John T. Parker and took his note for \$421, recited as the last payment of the consideration. In July, 1864, on the eve of his removal to Indiana, Wiggs assigned Parker's note to the appellant, in lieu of the unpaid notes for original amount held by him, and which were secured by the lien reserved in Montjoy's conveyance. And afterwards, in September, 1864, he conveyed the house and lot to *Parker*, who has not denied the charge of notice of all those facts and of an understanding that the lien should still continue. On the 21st of November 1865, *Parker*, for the consideration of \$1,300, conveyed the legal title to the house and lot to the appellee, H. H. Stratton, who, for all the circumstances, must be presumed to have then known the essential facts conducing to establish Mourning's title, by substitution, or otherwise, to some sort of lien on the land. And to enforce which Mourning brought this suit in equity against Parker and Stratton. And this appeal is prosecuted to reverse a decree dismissing the appellant's petition.

Although the simple exchange of the mortgage notes for a stranger's note might *prima facie* imply a waiver of the lien, yet the fact that the appellant made the exchange only for the accommodation of Wiggs, and the fact that *Parker* was in doubtful circumstances and had either removed, or was about to remove to Indiana, and the strong probability that the appellant would not have received his note unsecured, in satisfaction of notes amply secured by lien, may repel that presumption and authorize the conclusion that the parties did not intend more than a mere substitution, which would not extinguish the lien, but only change the debtor and the evidence of the same debt as still secured by the Montjoy lien, or by Parker's note to Wiggs, or by both.

There can be no rational doubt that the appellant consented to the exchange of notes under the belief that Parker's notes were before the exchange, and that if he had not felt so assured, he would not have surrendered Wiggs' notes for Parker's. Nor can we doubt that unless Wiggs also intended and expected some such continual lien, he contemplated a fraud on the appellant, whose only motive for the exchange was the accommodation of Wiggs. It is equally evident that, when Parker bought the house and lot from Wiggs and excuted his note for the last payment, both parties intended that Wiggs should hold the title as a real security for the payment of the note. Consequently when

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Wiggs, still holding the title in trust for the security of that note, assigned it to the appellant, he passed to him the incidental lien, which subsequent conveyance of the title to Parker, with full notice of the trust thus created by himself, did not, as between both those parties, divest in any way, or in any degree.

If Parker intended to hold the title unencumbered by that lien and to pass it to Stratton, he was guilty of fraud, or constructively, cognizant of the understanding and intentions of all the parties.

We are therefore of the opinion that the appellant is entitled to a still subsisting lien on the house and lot. And whether it results from the lien of Montjoy, or the assignment of Parker's note, or from both, is immaterial.

Wherefore, this court adjudges that the circuit court erred in dismissing the appellant's petition, and that judgment is reversed and the cause remanded with instructions to enforce the appellant's lien by sale, unless the debt due be voluntarily paid.

Dawn, Harlan, for appellant.

James, for appellee.

A. J. WHITMER ET AL & H. G. BIDWELL v. FELIX NALL'S EXR.
ET AL.

Judgments—Voidable only—Not Available to Sureties on Bond.

A judgment rendered against minors, in a suit by an administrator to settle the estate of an intestate, is voidable only, and not void, by reason of the failure of the infants to answer by guardian ad litem and if prejudicial to them, they may reverse it, but is valid and binding until reversed.

Same.

Sureties on a bond, executed for the payment of property, sold under such judgment, cannot be heard to complain of its regularity as to the service upon the minors or their answer by Guardian ad Litem.

APPEAL FROM MUHLENBURG CIRCUIT COURT.

May 23, 1888.

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OPINION OF THE COURT BY JUDGE PETERS:

In June, 1857, Felix Nall made and published his last will, and died in February, 1864. In a short time after his death the will was probated, and William P. Nicholls, a son-in-law of testator, and the executor named in the will, qualified as such. Mrs. Mary G. Nall, the widow, renounced the provision made for her, by her husband in his will, and claimed dower in the estate. About the 22d of August, 1864, the executor filed his petition in equity in the Muhlenberg circuit court and in the county of the residence of testator at his death, against his widow, devisees and heirs, some of whom were infants, asking the chancellor to construe the will, to direct him in the execution thereof, and to settle the rights of the parties—alleges that the testator, after the publication of his will, acquired two slaves, Mariah and Kate, and owned a man Mart at the time of its publication, and owned them all at his death, that they could not be divided in kind, and prayed for a sale of the slaves.

After giving construction to the will, and settling the rights of the parties, the court decreed a sale of the slaves, appointed his master commissioner to execute the judgment, prescribing the manner the slaves were to be sold and terms of sale. The master at the November term, 1865, of the court, reported the sale, which was confirmed without exception, and from which it appears that he made the sale on the 10th of November, 1865, on a credit of six months, and that appellant Whitmer bought the man Martin at the price of \$225, and executed his bond with J. Kittinger as his surety. That H. G. Bidwell purchased one of the women, and her child, at the price of \$151, and executed bond and surety. The other woman sold for \$50, but as there is no controversy about her, nothing further need be said of her sale.

Early in 1866, before their bonds matured, Whitmer and Bidwell filed their separate petitions in the Muhlenberg circuit court, to enjoin the collection of said bonds, and to have them cancelled, their actions were consolidated, and on a final hearing the court below dissolved their injunctions and dismissed their petitions, and from that judgment they have appealed.

In the very elaborate brief of the counsel for appellants two grounds are relied upon for reversal.

1st, that a judgment for the sale of slaves was rendered in an

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action brought by Nall's executor vs. Nall's devisees, etc., to have the will construed, that the court had no jurisdiction to render judgment to sell the slaves in that action, and that the proceedings, if the court had jurisdiction, were irregular, did not conform to the provisions of Chap. 86 of R. S., regulating the proceedings for the sale of slaves, if infants, and that the judgment was void.

2nd. That the consideration for which the bonds were executed had wholly failed.

As to the first objection, it is true, the action in which the judgment for the sale of slaves was rendered stands in the name of "William P. Nicholls, executor of the last will and testament of Felix Nall, deceased, vs. Mary G. Nall, widow, etc." But it appears in the pleadings, and exhibits, that he was the son-in-law of testator, his wife was living and a party to the action, the summons was served on all the infant defendants, all the adult defendants answer, admit the facts alleged in the petition, join in the prayer for a construction of the will, and for distribution and partition of the estate, as directed by the will. And the statutory guardians of the infants answer and join in the prayer for a full, final and equitable division and distribution of the estate.

It is perfectly certain that a division in kind of the slaves could not be made, they were held jointly by the parties, to the action, except the slave Martin, whom the testator directed to be sold after the expiration of 5 years, and of course, his executor had authority to sell him without the aid of a court of equity. The others did not pass by the will, but passed by the law of descent to the testator's heirs, he dying as to them, intestate, and under Art. 11, Chap. 86, 2 R. S. 303-4, any one or more of the parties interested could petition a court of equity to make the sale, and the court will decree a sale and distribution of the proceeds. The proceedings under which the slaves were sold were doubtless under the statute herein referred to, and in the prayer for a sale, the infants, by their guardian, joined and for that purpose and to that extent were plaintiffs.

But even if they are to be treated as defendants to the action, and they did not answer by *guardian ad litem*, the judgment rendered against them is not void, but *voidable* only, and if prejudicial to them they may reverse it, but it is valid and binding until reversed.. Porter's heirs vs. Robinson, 3 Mar., 254; Allison vs. Taylor, 6 Dana. 878.

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In the decree for a sale of the slaves, therefore, no error is perceived which can avail the appellants.

At the date of the sale, the adoption of the amendment to the Constitution of the United States was not only most probable, but was regarded generally as an event certain to take place within a short period, whereby the slaves in the United States would be emancipated. None could buy slaves then in ignorance of the precarious tenure by which such property was held, indeed there was no intrinsic or real value in slave property, and none could buy such property with the hope that there was any more than a contingent, speculative value in it. But even if there was no value *per se* in the slaves that fact did not destroy the legal obligation of the bonds given by appellants. They took the slaves as the sellers held them, there is no implied warranty of value. The prospect of value though remote, and of gain was the consideration, and a sufficient legal consideration to uphold the bonds, unless there was a fraudulent misrepresentation or concealment in the sale, of which there is no allegation or proof in this case. *Lightburn vs. Cooper*, 1 Dana, 273.

Nor can the failure of appellees to deliver to appellants the negroes at the expiration of the term of their hire change the case even if there was any proof that they were to deliver possession then, the title passed by the confirmation of the commissioner's report of the sale, and vested in them, they then held them subject to all casualties that befell such property as other owners.

Judgment affirmed.

Hay & Thomson, for appellant.

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J. E. FAGAN ET AL V. W. S. ELAM.

Parol Agreement—Extension of Time on Note, Inadmissible as Evidence.

A mere parol agreement to extend the time of payment of a note would be in contradiction of the note itself, and therefore inadmissible.

Principal and Surety—Liability Increased—Discharge of Surety.

In order to discharge the surety, by an agreement between the principal and the creditor, without the concurrence of the surety, there must be a binding contract between them for enlarging the time of performance, thereby increasing the risk of the surety.

Pills and Notes—Surety—Acceptance by Holder, of a Future Order for Collection to be Applied on.

The acceptance of an order from the obligor on a note, by the creditor payable on a third party at a future time, does not operate as a stay of proceedings on the note against the obligor and sureties, nor compels the creditor to delay proceedings until such time as default on the order be made. It is merely an acceptance as collateral security for the debt.

Duty of Surety to Discharge Debt—Rights to be Subrogated—Delay of Collection does not Discharge Surety.

The mere delay on the part of a creditor to collect his debt, unless the indulgency be such as to bring the surety within the Statute of Limitations, will not discharge the surety. It is as well the duty of the surety as of the obligor to discharge the obligation when it matures, and he may do this then, or any time afterwards for his own security, either to proceed immediately against his principal, or to be subrogated to the rights of the creditor. It is only when the creditor and principal debtor without the privity and consent of the surety, make a binding, valid agreement, change the terms of the original undertaking, by enlarging the time of performance, and increasing the risk of the surety, that he will be discharged.

Demurrer—Allegations in an Answer.

The allegations in an answer, forming both the conclusions of the Law and the facts in the case are demurrable.

APPEAL FROM HENDERSON CIRCUIT COURT.

May 21, 1868.

OPINION OF THE COURT BY JUDGE PETERS:

This action was brought by appellee against appellant, in Feb-

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ruary, 1867, on a joint and several note, executed on the 9th of January, 1860, for \$1,200, by one S. Nesler, appellant, and James Taylor, and due the 1st of January, 1861. At the first term of the court after the action was instituted, the obligor Taylor was made a defendant by an amended petition.

The following facts, substantially, were pleaded by appellant in the first paragraph of his answer in bar of the action. That Nesler was the principal debtor, and appellant and Taylor were his sureties, which was known to appellee at the time the note was executed and delivered to him. That appellee entered into an agreement with Nesler, without the knowledge or consent of appellant, when certain payments were made, which are credited on the note, that he should have further time for the payment thereof, after the same become due, thereby changing and increasing his risk and liability.

And that on or about the — day of —, 18—, and after the maturity of the note, Nesler gave to said Elam an order on one John H. Butler for an amount of money sufficient to satisfy the balance then due on said note, which order, when paid, was to go in discharge of the same, and that appellee by taking said order placed it out of his power to institute suit on said note until demand made by Butler of the amount of the order, and he had refused payment. That about the time appellant received the order on Butler, he informed appellant that said note was paid off, or if not, there was but a very small balance due thereon, thereby inducing him to believe that he was released from all liability on account of said suretyship.

To that paragraph a demurrer was sustained by the court below, and the propriety of that ruling is the first and material question for consideration.

If the conclusions drawn by the pleader, from the facts stated in the three several sentences which compose the paragraph recited, be correct as propositions of law, or perhaps either of them, the judgment of the court sustaining the demurrer is erroneous.

The first is, that appellant's risk and liability were changed and increased by an agreement between appellee and Nesler, without the knowledge, or consent, of appellant, that the time of payment should be extended after the debt matured.

Whether said agreement was founded upon a valuable consideration, or whether it was in writing, or in parol, is not stated. If it

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were a mere parol agreement to extend the time of payment beyond the time fixed in the note, such evidence of the agreement would be in contradiction of the language of the note itself, and utterly inadmissible. But the insuperable objection is the want of consideration, to uphold the agreement. *Chancellor Kent in King vs. Baldwin, etc.*, 2 *John Chy Reports*, pp 557, after reviewing the English and American authorities on the subject, says the principle to be extracted from the cases is, that in order to discharge the surety, by an agreement between the principal debtor and the creditor, without the concurrence of the surety, there must be a binding contract between them for enlarging the time of performance.

And to the same effect is the later case of *Tudor vs. Goodloe*, 1 B. M., 322, and the authorities there cited, at considerable length.

Second. That after the maturity of the note, Nesler gave to Elam an order on John H. Butler for an amount sufficient to pay off the balance then due on the note, which order when paid, was to go as a discharge of said note, and the following words are added as a sequence by the pleader:

“And *thus* the said plaintiff, by the acceptance of said order, placed it out of his power to institute suit on said note, until demand should have been made of Butler on said order, and payment had been refused by him.”

How, or by what contract appellee put it out of his power to sue on the note is not disclosed, nor are any facts stated from which such a presumption could arise. The mere reception of the order could, of itself, have no effect. Elam may have taken it as collateral security for his debt, and that is perhaps the proper if not the only logical construction the averment is susceptible of.

But to the part of the answer now under examination there is another fatal objection. It is well settled that mere delay on the part of the creditor to collect his debt, unless the indulgence be such as to bring the surety within the protecting influence of the statute of limitations, will not discharge the surety.

It is as well the duty of the surety as of the principal debtor to the obligee, to discharge the obligation when it matures, and he may do this then, or at any time afterwards for his own security, either to proceed immediately against his principal, or to be subrogated to the rights of the creditor, or he may call upon his creditor by the aid of the chancellor to coerce payment of his debt from his principal. And it is only when the creditor and principal, *without the*

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privity and consent of the surety make a binding, valid agreement, change the terms of the original undertaking, by enlarging the time of performance, and increasing the risk of the surety, that he will be discharged.

It is not alleged that the giving the order on Butler, and receiving it by appellee, were done without the concurrence and approval of appellant. Nor can the alleged want of knowledge and consent alleged in the preceding sentence, in reference to the enlargement of the time of payment, promised at the time the credits were endorsed on the note; be made to apply to the drawing and delivery of the order, because the answer shows them to be different transaction and transpired at different times.

And last, if Elam told appellant the debt was paid off, or about paid off, and he did not regard it as a careless, and unguarded expression, or did not know the declaration was unmeaning, by reason of some qualifying statement, it is not explained why he did not by a sufficient allegation rely upon the plea of payment, as what he alleged was not sufficient to show he was otherwise discharged.

As to the amendment offered, and which the judge refused to permit to be filed, we can have nothing to do with it, because it is not before us, the clerk is not authorized to certify to this court any paper, as a part of the record, which is not filed by an order of the court, or incorporated in a bill of exceptions properly authenticated. The rejected amendment is not incorporated in a bill of exceptions, and the clerk's statement that the one copied is the same which was offered by appellant, and rejected, is no evidence of the fact.

But we may remark that the paper found in the transcript has been examined by the court, and obviates only one objection taken to the original answer, in stating that the order on Butler was drawn and delivered to appellee without the concurrence and knowledge of appellant and with it in, the offered defense was insufficient.

Wherefore, the judgment is affirmed.

Turner & Trafton, for appellant.

Cissell & Vance, for appellee.

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R. L. CALDWELL ADMR. v. DAVID CALDWELL'S HEIRS.

Administrators—County Court Settlement Prima Facie Right—Surcharge.

A settlement made by an administrator, with the County Court is prima facie right, but when the administrator seeks to subject land descended to the heirs and they surcharge the settlement, and show errors, this prima facie presumption is greatly weakened.

APPEAL FROM LIVINGSTON CIRCUIT COURT.

May 29, 1868.

OPINION OF THE COURT BY JUDGE WILLIAMS:

The main object of the suit brought by R. L. Caldwell was to subject the land which had descended from the decedent to his heirs to the payment of a balance found due him by a settlement of his accounts with the county judge, of \$2,146.98. This the heirs resist, surcharging the settlement in many particulars, and alleging that he recovered funds not accounted for, and had the use of the land and a negro woman until his mother's death and should be charged for these. The court on final hearing dismissed his petition of which he complains. It is quite evident from the evidence that he had lived with his father for several years previous to the old man's death, and had conducted his business and had the control of his affairs, and the evidence also indicates that very soon after the old man's death it was agreed among the heirs that he should continue until the old lady's death in the same way, hence, as no accounts of particular daily transactions seems to have been kept between the old man and his son; none should now be allowed the administrator, for his individual outlay and work, previous to his father's death, or he should be made to account for the profits of the farm and warehouse, and show how he expended the various sums he collected for the old man in his life time. D. Caldwell, deceased, had a debt on Alvis for \$2,418 due April 1, 1860, credited with \$301.29 as of January 1, 1861, as shown by the appraisement bill.

Caldwell owed the Shelys about the same amount, due at the same time, and for which they sued the administrator, and Alvis

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paid his debt so as to pay the Shalbys, February 7, 1863, and also paid towards the cost of Shelby's executions \$60 over and above his debt.

The amount of the Alvis debt due the estate, as reported by the administrator on the sale bill, with its interest to February 7, 1863, would be \$2,503.71. In his county court settlement he reported it at

\$1,914.00

Error \$ 589.71

In his voucher No. 9, he gets credit for the Shelby debts, as evidenced by the sheriff's receipt of February 7, 1863, with interest thereon to date of settlement, September 13, 1864, \$2,161.53
The actual amount paid as evidenced by said receipt 1,974.00

Error against the estate of 187.53
As he then collected the Alvis debt he should be allowed no interest for advance payment on this sum.

He concedes collecting on the Cally debt due decedent for which he gave no account \$313.00
He reports on appraisement bills, debts on Yates and Sumnor for which he has not accounted \$22.90.
He gave no account of the payment of Alvis on account of the costs of the Shelby debts, which Alvis says accrued because he did not pay his debt to decedent, which would have prevented the costs on the Shelby debts of \$60.00

Alvis had also paid R. L. Caldwell fifty dollars on this debt due decedent which he had not credited on the note, and having reminded him and getting the credit, R. L. Caldwell made this the basis of his voucher No. 8 against his father's estate with interest thereon, as no credit was entered on the note, though the payment was made in his father's life-time, it may be fairly presumed he never paid it over, therefore it should be set down as error \$54.75

No. 15 is for money paid out on lease and in his father's life-time, and as he held his fathers money and did his collecting, it should be presumed to be paid with his father's means \$96.06

No. 16 is for work and labor done in the year 1861, without any dates, and for expenditures on warehouse, etc., and should be rejected for the foregoing reasons \$746.42

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These errors aggregate the sum, without considering interest, as charged by the administrator of \$2,070.37

And the interest wrongfully charged by him on the various vouchers down to date of settlement will over balance the defect of \$76.61

The sum he claims of \$2,146.98

So that, without considering the rents and hire of the lands and slaves, we concur with the circuit court in dismissing his petition. What the arrangement was between himself and father does not appear. If he was to have the benefit of the farm and warehouse without accounting for any profits, it was clearly erroneous to allow him for labor and expenses as charged in voucher No. 16.

If he was to account for rents or profits then as the utmost latitude of evidence, in his favor, is that the same arrangement was continued after his father's death so long as his mother should live, he should be required to account for rents or profits as he was to do in his father's life-time, either the allowance of No. 16 was erroneous, or he should be charged for rents and hire. We think under all the circumstances developed, that No. 16 should be rejected and he not charged for rents or hire, and of this he certainly has no right to complain.

The county court settlement is to be presumed as prima facie right, but when the administrator seeks to subject land descended to the heirs and they surcharge the settlement and show so many errors, this prima facie presumption is greatly weakened if not destroyed, especially as these settlements are generally made ex parte by the administrator, and the county judge has only the advantages of his explanations, reports, and papers.

Wherefore, the judgment is affirmed.

L. D. Husbands, for appellant.

Rodman & Green, for appellees.

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D. W. DYEN ET AL *v.* J. H. BROWNFIELD ET AL.**Sale—Bond for Purchase Money—Parties to Suit—Pleadings.**

In a suit to enforce a sale bond of personalty, it is necessary to bring all originally interested parties before the Court, that their interest, as appearing, either by enforcement or cancellation of the bond, may be protected.

Estoppel—Parties to Attachment Suit—Sales Under.

Parties to an attachment suit, where personal property is sold there under, are estopped from sitting up an adverse title inconsistent with said adjudication which is binding upon them until reversed.

APPEAL FROM LARUE CIRCUIT COURT.

May 30, 1868.

OPINION OF THE COURT BY JUDGE WILLIAMS:

There can be but little doubt but that the purchasers knew the exact situation of the title to the slaves, the family relationship, and the fact that one of them, who also acted as agent for others, was the clerk of the court in which the proceedings were had, and must be presumed to be familiar with the papers of the cause, and he being a brother-in-law and boarding at the same house with J. A. Middleton, who lived with his mother, and who was the only joint interested party with N. H. Middleton as heir of their deceased father, strongly fortifies this presumption, and precludes any supposition that an actual fraud was perpetrated in the sale by the commissioner, and the fact that the purchasers repared from the year 1863, when the purchase was made, until the year 1865, when it was quite evident that slaves would be freed by constitutional amendment, still the more impresses the mind that this is an attempt to escape from an unfortunate purchase. The petition of the appellees seeks to set aside their purchase and for a perpetual injunction against the collecting their sale bonds executed.

It is sufficient to say his brother and mother were parties defended for the purchase price, upon two grounds mainly, that is, that N. H. Middleton was not either actually or constructively, before the court, and that he had no interest in the slaves because of an agreement between him and his brother and mother.

It is sufficient to say his brother and mother were parties defend-

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ant to the attachment suits and are bound by the adjudications therein, which is binding upon them until reversed, and they are thereby estopped from setting up any adverse title inconsistent with said injunction. On the other defense it will suffice to say that N. H. Middleton had an interest in protecting the sale which cancelled his indebtedness to his creditors to the extent of the sale and purchase, and therefore he was an essential party to the appellee's injunction suit, and before any cancelment of the purchasers' bonds should be granted in any view of the case he should be made a party and brought before the court, there is no reason assigned for not making him a party.

When he shall have been made a party and seek to confirm or reject said sale by the commissioner, it will be sufficient time to determine whether the proceedings to subject his interest in the slaves were a nullity or only erroneous as to him.

The dissolution of the temporary injunction pending the litigation could not affect the ultimate right of appellees to a perpetual injunction on the final trial for they could have sued, prayed for, and obtained this without asking for or obtaining the temporary injunction to operate during the litigation. For the error suggested the judgment is reversed, with directions to the parties to amend their pleadings so as to make W. H. Middleton or his representative a party defendant upon pain of dismissal of their petition, unless some legal reason for not doing so shall be assigned.

Read & Murray, for appellant.

Wintersmith, Cofer, for appellee.

B. WHALEY ET AL V. M. E. WHALEY ET AL.

Maintenance—Stipulation for in Deed—Failure to Perform Requirements—Reversion.

The failure of vendees in a deed to provide sufficient maintenance for their relations, as a condition precedent, stipulated in the deed, and their removal to another state and remaining away for several years, is held sufficient to entitle the grantors to a reversion of the title to them.

APPEAL FROM HARRISON CIRCUIT COURT.

May 23, 1868.

OPINION OF THE COURT BY JUDGE HARDIN:

The judgment of the circuit court cancelling the deed from Benjamin Whaley and wife to B. L. Whaley was rendered in May, 1863, and was on the appeal of the defendants reversed by this court in October, 1864; it appears by the amended pleadings filed since the return of the cause to the circuit court, and by the evidence that shortly after said judgment of the circuit court was rendered and before the appeal was prosecuted therefrom, the defendant May E. Moffatt, late Whaley, and her husband, she having intermarried with William Moffatt, abandoned the possession of the land in controversy, leaving said Benjamin Whaley and wife in the occupancy thereof, and that Moffatt, and wife, after residing in the vicinity of the land until in July, 1865, removed to the state of Indiana. Said Benjamin Whaley appears to have removed from the land. But he held the possession of it by a tenant until his death, which occurred in 1865 and that said Moffatt and wife did not maintain or have the care of said Whaley and wife after their removal from the land, nor does it appear that after the time said Benjamin and wife as the survivor of them would permit them to do so, although that Moffatt and wife was by an amended answer filed in May, 1860, expressed their willingness to do so.

The judgment dismissing the plaintiffs' petition and from which this appeal is prosecuted, was rendered in May, 1866, upon the execution by Moffatt and wife with surety approved by the court,

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of a covenant that they would support and maintain and provide for the plaintiff Jane Whaley pursuant to the stipulations of said deed.

We are of the opinion that by the removal of the appellees from the land and subsequently from the state, and their failure to provide for Whaley and wife and the survivor of them according to the stipulations of the deed, the title reverted to the grantors, as provided for in the deed, in the event of a failure on the part of the grantees as his representatives to comply with the condition of the deed, and the appellants were therefore entitled to the relief sought by them.

Wherefore, the judgment is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Ward, for appellants.

THOMAS J. GORIN ET AL V. JAMES D. SMITH.

Warehouse-Man—Absence of Instructions—Unforeseen Emergency.

A warehouse man, in the absence of any direct instructions, by the consignor, may exercise his own discretion and in cases of unforeseen emergency may act contrary to general instructions provided he acts in good faith.

APPEAL FROM BARREN CIRCUIT COURT.

May 26, 1868.

OPINION OF THE COURT BY JUDGE PETERS:

Whether or not Ronald, the warehouse-man, to whom the tobacco was consigned was expressly authorized by Smith, the planter, to sell it, is a question perhaps not necessarily involved in the determination of this controversy; he was certainly bound to follow the lawful instructions of Smith, and in the absence of any direct instructions the weight of authority seems to be that he may exercise his own discretion; but in cases of unforeseen emergency the consignee may act contrary to general instructions, when those instructions are manifestly applicable to ordinary circumstances only, as if he acts in good faith and with

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reasonable diligence he will be protected. *Story on Agency* 78, 113, 225.

Ronald in his evidence states he has no recollection of having received any instructions from Smith on the subject of the sale of the tobacco, and says two reasons influenced him in making the sale. *First*. The price which he received for it he regarded as a very good one. *Secnd*, he had no room in his warehouse to store it, on account of the large quantity of tobacco then on hand, from which it must appear he might lawfully sell.

From the language of the order which is the best evidence of what the real transaction between the parties in relation to Smith's tobacco, it is to be understood that he sold it to Gorin or to him, and his partner, and as it was not contemplated by either of the parties that the tobacco was to be removed, but understood it was to remain with Ronald until it was sold, the direction was to pay the proceeds over to T. J. Gorin.

The instructions in this view of the case asked by appellants were in conflict with the opinion of this court in the case between these parties 2 *Duvall* 155, and the instruction given for appellee conforms thereto.

Wherefore, the judgment is affirmed.

Underwood, Rodman, for appellant.

Barnett & Edwards, for appellee.

GEORGE W. McGRUDER v. R. H. FIELD.**Lands and Conveyances—Perfection of Title—Consideration Subjoined.**

In the sale of lands, the vendors title not being perfect, and the possible perfection of it. being uncertain, tedious and expensive, the vendee has the right to enjoin the collection of the consideration until the vendor should, at his own expense, perfect it.

Feme Covert—Unrecorded Deed—Adverse Possession.

A feme covert is not bound by an unrecorded deed and the possession of land by a vendor under such is held not to be adverse to femes covert.

Vendee in Possession—Time to Perfect Title.

When a vendee is in the undisputed possession, of lands, equity requires him to wait a reasonable time for obtaining an assured title.

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Limitation—Married Women.

The statute of limitations does not begin to run against a married woman until she becomes discovert.

APPEAL FROM BULLITT CIRCUIT COURT.

May 26, 1868.

OPINION OF THE COURT BY JUDGE ROBERTSON:

At the time of instituting this suit appellee's title being imperfect, and the possible perfection of it being uncertain, tedious and expensive, the appellant had a right to enjoin the consideration until the appellee should, at his own expense, perfect it.

It is evident, however, that the appellant filed his petition more for rescission than for a specific execution; and, therefore, being in the undisturbed possession, equity requires him to wait a reasonable time for obtaining an assured title.

It appears that the possession of B. F. Caldwell, who sold the land to the appellee, was constructively adverse as to his vendors, who were bound by their conveyance to him, but was not adverse as to *femes covert* who were not bound by the unrecorded deed. But time and the non-appearance of any claim against the appellee's full title conduce persuasively to assure a safe title to the appellant under the appellee's general warranty whenever made. Independently of these considerations, the appellee's title to all the land sold to the appellant seems to have been sufficiently perfected *pendente lite* except as to one-third of one-thirteenth. The conveyance by Sarah Greathouse was not binding on her as a married woman. She became discovert in the year 1843 and then B. F. Caldwell's possession became constructively adverse to her, and the lapse of time since and non-claim by herself or heirs *prima facie*, imply acquiescence in her remuneration of title by his imperfect deed.

But, as the one-third of one-thirteenth before alluded to, though not fully and irrevocably transferred to the appellee is yet comparatively so minute, and as he has apparently acted in good faith and offered security against it, the *status* of the title presents no ground for rescinding the contract. And, therefore, so much of the decree as dismissed the petition for rescission is

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affirmed, but so much of it as authorizes execution for the entire consideration, as we think, partially improvident, is reversed. Before the whole amount be coerced, either the proffered indemnity should be secured or the whole title perfected which may be done soon without any essential loss or inconvenience to the appellant. And unless, on the return of the case to the circuit court indemnity shall be secured against the said third of a thirteenth, execution should be suspended for as much as will effectuate that indemnity, until the full title may be perfected and further time given for that purpose. Wherefore, the cause is remanded for such further proceedings as herein just indicated. Each party must pay his own costs in this court.

A. H. Field, and Riley, for appellant.

R. H. Field, for appellee.

MASONIC TEMPLE CO. v. JOHN WARD.

Limitations—Express Trust—Corporations—New Institutions Liable for Debts of Old.

It is a well settled rule that limitations will not run, as a general rule, against an express trust. An act providing for the organization of a new corporation in which it provides "to raise the necessary funds to pay the debts not secured by mortgage or deed of trust, and the punctual payment of interest on its debts and liabilities is held to clearly contemplate that the property of an old corporation it acquired, should pass to it, pledged for the payment of the debts of the old company.

APPEAL FROM LOUISVILLE CHANCERY COURT.

May 25, 1868.

OPINION OF THE COURT BY JUDGE HARDIN:

As it sufficiently appears that the original claim of the appellee against the "Masonic Fraternity" as fixed by the arbitrator's award of \$1,580, was reasonable and just, if the conclusions of the chancellor be correct, that the Masonic Temple Company, as the successor of the Masonic Fraternity, took the property of the

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latter with a liability for its debts, and upon trust for their payments, against which limitation would not run to bar the claim, it may not be necessary to determine whether the judgment of the Jefferson Circuit Court upon the award was or not void for want of legal service of process, or if the same be void, whether the claim, notwithstanding the award, is not barred by limitation.

The act of February, 1860, providing for the new organization, seems to us to clearly contemplate that the property of the "Masonic Fraternity" should pass to it, pledged for the payment of the debts of the old company, the purpose of the act is expressed in the first section being

"to raise the necessary funds to pay the debts not secured by mortgage or deed of trust, and the punctual payment of interest on its debts and liabilities,"

and this purpose seems to have been recognized and acquiesced in, in the organization of the new company.

But it is insisted for the appellant that if it be true, as is we think correctly contended for the appellant, that the transfer of the property created a trust in favor of the general creditors, the statute of limitations, nevertheless, runs against the appellee's claim. And the ordinary case of a devise of an estate by will to a personal representative for the payment of debts, is cited for illustration, as one which is opposite in principle with this, and in which the statute would run in favor of the estate, notwithstanding the trust. But we do not regard the two cases as analogous. Whether the distinction arises from the difference between the rights of a creditor against an estate, however devised, and those of a *cestui que* trust, it is well settled that limitation will not run, as a general rule, against an express trust.

Wherefore, perceiving no available error in the judgment, the same is affirmed.

Barr, for appellant.

Caldwell, for appellee.

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JOHN W. BRISCOE v. JAMES BRISCOE'S ADMR.

Donatio Mortis Causa.

According to the well settled doctrine on the subject, to constitute a donatio mortis causa, there must be three attributes:

1. The gift must be with a view of the donor's death. 2. It must be conditioned to take effect only on donor's death by his existing disorder. 3. There must be an actual delivery of the subject of the donation.

Same—Choses in Action—Pass by Donation.

Not only negotiable notes, and bills of exchange, payable to bearer, or endorsed in blank, and bank notes, but promissory notes not made payable to "bearer" without an assignment from the payees' donor may be the subject of a donatio mortis causa, as the beneficial interest therein may pass by delivery.

Same—Gift in Contemplation of Death.

The delivery of a note to a possible future heir of the donor, who was old and in feeble health, would not amount to a donatio mortis causa, where the gift was accompanied by the statement that it was to take effect if he died, he being at the time very feeble, and believing that he could not live long, and stating that if he did not die, and lived to need it the note could be returned to him. The donor lived for several months afterwards and the pleadings show nothing to intimate that the donor died of the same illness existing at the time of the alleged donation.

APPEAL FROM LOUISVILLE CHANCERY COURT.

May 26, 1868.

OPINION OF THE COURT BY JUDGE PETERS:

This action was brought in the Louisville chancery court by Jacob B. Briscoe, administrator of James Briscoe, deceased, against John W. Briscoe, and James and John Burks, to compel said J. W. Briscoe to surrender to him a note executed on the 26th of May, 1859, for \$1,110 to his intestate by said Burks, due twelve months after date, which he alleged had been placed in J. W. Briscoe's hands by his intestate to present to the obligors for payment, and to collect, and he prayed judgment against the Burks for the amount of the same.

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John W. Briscoe resisted the plaintiff's claim to the note, denied in his answer that the note was delivered to him by intestate to collect, alleged that intestate was at his death, and had been for many years previous thereto, a widower, and childless, that he was the only child of an only brother of the whole blood, that some two months, or six weeks, before his death gave said note to him, declaring at the time that he was in feeble health, and knew he could not live long, but if he lived to need it, defendant could return it to him, and if he died, the note was to be defendant's; the note was delivered to him, and he accepted it on the terms the same was given to him, and he thereby became the owner of it. That intestate was in fact then in feeble health, expected to live but a short time, and died soon thereafter.

The Burks made no defense to the action; on final hearing the court below rejected J. W. Briscoe's claim to the note, and rendered judgment against the Burks for the amount thereof in favor of the plaintiff, and John W. Briscoe appeals.

It is insisted by the learned counsel for appellant that the transaction by which he was put in possession of the note is invested with all the requisites necessary to entitle him to it as a valid donation *mortis causa*.

According to the well settled doctrine on the subject, to constitute a *donatio mortis causa*, there must be three attributes: (1) The gift must be with a view to the donor's death. (2) It must be conditioned to take effect only on the donor's death by his existing disorder, or in his existing illness. (3) There must be an actual delivery of the subject of the donation. 1 Story's Equit., sec. 607.

Heretofore it has been doubted whether choses in action, bonds, bills, notes, etc., could pass by a donation *mortis causa*. But it is now the established doctrine that not only negotiable notes, and bills of exchange, payable to bearer, or endorsed in blank, and bank notes, but promissory notes, not made payable to "bearer" without an assignment from the payee's donor to the donor, may be the subject of a *donatio mortis causa*, as the beneficial interest therein may pass by delivery. Turpin, etc., vs. Thompson, 2 Met., 420; Kemper vs. Kemper, 1 Duv., 401, and authorities cited.

As, therefore, the note may be the subject of such a gift, and an assignment thereof by the holder not indispensable to its accomplishment, and if it be conceded that the possession of it, is,

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prima facie, evidence of an actual delivery, whereby the last requisite may be regarded as made out. Has appellant failed to show the existence of the others, or either of them.

It is alleged in the answer of appellant that the intestate was his uncle, that he delivered the note to him some six weeks, or two months, before his death, declaring at the time that he was in feeble health, and knew he would not live long, and said he gave him the note; if he died, it was to be his (appellant's), but if he lived to need it, it could be returned to him. This is the substance and whole meaning of the allegation on the subject of the donation, omitting the reason therefor as stated in the answer.

Admitting that the gift was made in view of the donor's death, according to the allegation, was it to take effect on condition that he died of a disorder then existing, or in his then existing illness? It is not so alleged; but he lived six weeks, or two months, after the alleged gift, and delivery, and from anything that appears in the answer he may have recovered from the feeble health from which he was suffering, and died of another and altogether different disease.

In the two cases before cited, decided by this court, importance was given to the fact that the gifts were made in the last illness of the donors, and in contemplation of death, and which, as stated in the case in 1 Duv., occurred within a few days.

Here intestate lived weeks, and the strong probability is as much as two months, after the delivery of the note to appellant, having ample time and opportunity to dispose of his estate by last will, which according to the evidence he intended to do, and had a writing prepared for his will, but for some unexplained cause never was perfected. And certainly there was ample time and opportunity to have had the delivery of the note, and the terms of its delivery, attested, and published in the most satisfactory mode. But on the subject of the gift, appellant has introduced but one witness, who was comparatively a stranger to intestate, for he proves, himself, he never had but two conversations with him, in the last of which he states he was hauling wood to intestate, and he sent for him to come into his house, and when he went in, he asked him when he had seen John Briscoe, and then stated to him that he had given John Briscoe a note on the Burks, and also stated that he had had but one child, who was dead, and since that event John Briscoe appeared as near to him as his own

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child, and that was all the conversation that he remembered occurred between them.

This witness does not prove that James Briscoe was then even in feeble health, nor what his condition was at the time he gave the note to appellant; his condition as to health at that time he did not know, as must be presumed, or he would have proved it. Moreover, according to his statement, the gift was absolute and irrevocable, and had more the semblance of a gift *inter vivos*, than a donation *mortis causa*. But in view of the variance between the allegations of the answer of appellant and the proof offered to sustain it, the transaction cannot be considered as possessing legal validity in either character.

Wherefore, the judgment is affirmed.

Caldwell, for appellant.

Bullock & Anderson, for appellee.

WALLER TILLER ET AL V. WILLIAM KIDWELL ET AL.

Contracts—Cancellation—Feeble Intellect—Inadequacy of Price—Innocent Purchasers.

Whilst the general equity rule that feeble intellect, with inadequacy of price, with but slight circumstances evidencing fraud or over-reaching, will suffice to the cancelment of contracts, yet when such contract has been acquiesced in for more than fourteen years and the land has gone into the hands of innocent purchasers, there should be great preponderating evidence and circumstance against the sale before the property rights of innocent purchasers should be disturbed.

APPEAL FROM HENRY CIRCUIT COURT.

May 28, 1868.

OPINION OF THE COURT BY JUDGE WILLIAMS:

John Mortimer, December 11, 1810, as a gift for the esteem and friendship which he entertained toward John Tiller, his wife and children, conveyed to John Tiller and wife 200 acres of land with a prohibition against their selling it during life, it being intended by the donor as a home for the family during their

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lives. John Tiller having died, his wife still surviving, and Waller Tiller being one of the five children left by him, in the year 1852, sold his undivided fifth interest in the remainder by title bond to Washington Murphy, in consideration of \$100.

Murphy afterwards sold and assigned this bond to W. B. Morris, who was the subscribing witness to the bond, for \$300. Lucy Tiller, the widow, was still surviving, though about 84 years old, when this suit was brought August 22, 1866, Kidwell had previously by the consent of Waller Tiller, as he avers in his cross petition, and which is not denied in the reply thereto, got possession of this undivided interest sold by him to Murphy as witnessed by the said title bond.

The object of this suit was to rescind the original contract with Murphy, cancel the bond and reclaim the land, on the averments that Waller Tiller was of feeble intellect, incapabel of making prudent contracts, and was overreached and defrauded by Murphy, all of which, however, is denied by the defendants Kidwell, Morris and Murphy.

Whilst the evidence does tend to show that Waller Tiller was of feeble intellect, yet he was permitted by his family and relations to manage and control his own affairs, and many facts go to show that he was slow and careful in his trades, and of at least common ordinary prudence. Some, it is true, would indicate otherwise. Many witnesses were examined by both sides, and these differ in opinion as to his capacity to manage his own affairs prudently, a majority regarding him as incompetent, but the facts seem to be the other way.

The fact that another brother sold his interest, afterwards, at the same price, of which there seems to be no complaint, the uncomplaining acquiescence of Waller Tiller, his family and relations, in this trade for over eight years, when it went into the hands of Kidwell, who was an innocent purchasers, and then the continued acquiescence for six years after his purchase, whilst the land was largely increased in value, and by the fortunate location through this land of a railroad now being built, and which is of but recent origin, tending to still further enhance its value, all fortify the presumption that it is more the enhanced value since the sale to Murphy than its then value which makes it now desirable on the part of Waller Tiller and his friends to

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have this trade rescinded. And this presumption is greatly strengthened by the positive evidence of several, seemingly intelligent witnesses, that Murphy gave a fair price for Waller Tiller's interest at the time of the trade, encumbered as it then was by his mother's life estate, without power in her to sell it.

Whilst the general equity rule is that feeble intellect, with inadequacy of price, with but slight circumstances evidencing fraud or overreaching, will suffice to the cancelment of contracts, yet when such contract has been acquiesced in for more than fourteen years, the life estate, by course of nature, soon to terminate, the land has greatly enhanced in value, and has gone into the hands of an innocent purchaser, all going to repel the inadequacy of the original consideration, there should be clearly greatly preponderating evidence and circumstances against the sale before the property rights of an innocent purchaser should be disturbed, *especially as the legal incapacity is not made out.*

Under all the peculiar circumstances of this case, we concur with the circuit court in dismissing the plaintiffs petition, and directing a conveyance on Kidwell's cross petition at his own costs.

Wherefore, the judgment is affirmed.

Pryor, for appellants.

DeHaven, for appellees.

JAMES PAYTON ET AL V. JEFFERSON STAGNER ET AL.

Vendor's Lien—Prior to Widow's Claim as Devisee.

The unpaid purchase money on land is prior to a widow's interest in her husband's real estate as devisee.

Same—Sale Free from Widow's Dower.

A court of equity may properly sell so much of a decedent's land as is necessary to pay the purchase money due, free from the widow's dower.

Husband's Will—Renunciation by Wife—Dower.

The wife must renounce her husband's will before she can have dower assigned.

Second Marriage—Effect on Dower.

A wife's dowerable interest in her husband's land ceases upon her second marriage.

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APPEAL FROM GARRARD CIRCUIT COURT.

May 30, 1868.

OPINION OF THE COURT BY JUDGE WILLIAMS:

As to the outstanding unpaid purchase price of the land still owing by Drewry Strewsbury at his death the vendor's lien was superior to and had priority over any interest his widow could take under his will and, so far as she may have paid it, she would be entitled by subrogation to the creditors' lien, therefore, it was eminently proper for the court to sell so much of the land as was necessary to pay this free from any claim of the widow, because it would have been injurious to the heirs to have sold subject to her right to enjoy the land during widow-hood, as provided in the will, besides depriving the creditor of his prior lien, she released the estate from all liability to her for advance payments except certain designated vouchers, and it was for these that the judgment of sale was rendered.

The sale of all that portion of the land freed from her claim was therefore right.

But it is also insisted that the assignment of dower to her was void and should vitiate the sale of half the remainder interest of that portion encumbered with her dower and also the other portion.

There is nothing in the record to show that she ever renounced her deceased husband's will, and she says in her deposition she never did, and the fact that she undertook its execution as administratrix with the will annexed, raises a strong presumption that she accepted its provisions.

The assignment of dower to her in the thirty-seven acres of the 122½ acres tract may be regarded as the informal setting this much aside to her under the will, by way of freeing the remainder from the incumbrance of her interest under the will in favor of the vendor's lien, and especially as a small portion of the money to be raised was not lien claims and had to be raised by a sale of half the remainder interest in the thirty-seven acres so assigned her. She married the second husband subsequent to the sale under order of the court, and when her husband sold her dower interest to Gouch she says she disavowed having any such interest, when Gouch expressed an indifference as to her interest so she would

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sign the papers. Two or more of the Strewsbury children were of full age when the judgment of sale was rendered and executed, and were parties to the suit, therefore, so far as the decretal sale is concerned all of the devisees being of a class would be barred from disturbing the judgment after three years.

But as to the remaining half of the land encumbered with the widow's dower which was sold, they are not barred and as her interest in it ceased upon her second marriage, the court properly adjudged a recovery in favor of the heirs, and for the reasons assigned, as properly rejected their claims to that portion sold by said judgment. Wherefore, the judgment is affirmed.

Bradley, for appellant.

Hill & Alcorn, for appellee.

ANN L. BOYD v. WARD BOYD ET AL.

Land—Decretal Sale—Commissioner Attorney for Purchaser—Preventing Competition.

A sale, made by an administrator, acting as commissioner, who was the attorney for the purchaser, coupled with the fact that the purchaser appealed to the sympathies of other bidders, cannot be sustained by a court of equity.

APPEAL FROM M'CRACKEN CIRCUIT COURT.

May 25, 1868.

OPINION OF THE COURT BY JUDGE HARDIN:

Whether the court erred in setting aside the sale of the land in Marshall county, seems to be the only question necessary to be determined on this appeal. Waiving some irregularities in the proceeding by constructive service, against Ward Boyd and others, by the appellant, we are of the opinion for other reasons, that the court properly vacated the said sale of land in Marshall county. Although Husbands, the administrator of Linn Boyd, deceased, and commisisoner to make the sale, may have acted in good faith, the fact that he had been the counsel for Mrs. Boyd, and apparently

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acted as such after he became the administrator, and in that capacity a defendant to the suit, must subject his action as commissioner to scrutiny. We are not satisfied from the evidence that the land under his management was not sold for less than its fair value, and whatever reason the appellant may have had to complain of the conduct of the executors, Boyd and Johnson, and to seek reparation for real or supposed wrongs, by preventing competition at the sale, by means of appeals to the sympathies of other bidders and those who might otherwise have become bidders against her, for the land, we cannot under all the circumstances regard her purchase as one which ought to be sustained in a court of equity.

Wherefore, the judgment is affirmed.

Husbands, T. N. Lindsey, for appellant.

W. Lindsay, for appellees.

WILLIAM FEHLER v. JAMES G. PAGE.

Personal Property—Warranty—Limitation.

Where personal property is retained for five years, without complaint, if there was a warranty at the time of the sale of same, the law presumes that the property was as warranted to be.

APPEAL FROM BARREN CIRCUIT COURT.

May 23, 1868.

OPINION OF THE COURT BY JUDGE PETERS:

The fact that the jack was lying down at the time of the sale, there being no other alleged obstruction in the way furnished no excuse for the failure of appellant then to measure him, or to inspect him and ascertain his true height.

Moreover it appears that more than six years had elapsed from the date of the sale until the answer was filed, during all of which time no dissatisfaction was manifested with his purchase by appellant, nor unwillingness to retain him, and it must be presumed

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he used the jack for the purpose for which he purchased him, and realized gains from his services. Nor is it alleged in the original, or amended answer that he was induced by any subsequent representations true, or false, of the seller, to retain the jack for so great a length of time, without complaint, if there was a warranty the law presumes he was such as he was warranted to be. 3 Starkie 1665-6.

The period which had elapsed between the sale and the filing of the answer, in which the first complaint of the breach of warranty is made, is shown by the pleadings. The defense set up in the answer was therefore insufficient, and the demurrer properly sustained. Wherefore, the judgment is *affirmed*.

Lawless, for appellant.

Barnett & Edwards, for appellee.

FOWLER. MILLS & Co. v. D. SMEDLEY ET AL.**Contracts—Rule of Law Changed by Usages of Trade and Custom—Steam Boats.**

The rule of law in relation to contract may be changed by usages of trade and custom in particular localities. But before a custom can become a law, it must appear that the usage has been general and uniform, and the custom peaceably acquiesced in, and not subject to contention and dispute.

Steamboats—Liens on for Supplies Sold.

The statutes give no lien on a steamboat to which goods and supplies are sold, for speculation by the parties or to enable the boat to earn freight.

Contract—Assumption by Bailee of Debts Due Steamboat.

A contract by a bailee to become responsible for all the existing debts of a steamboat, the use of which had been transferred to him, is held to be an obligation only to pay such debts and liabilities as were liens on the boat for their payment, and not for such debts as had been contracted by former bailees for speculation.

Statutes—Lien on Steamboats—Contracts by Usage and Custom.

A statute giving a lien on steamboats for certain specific debts, will

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operate to destroy any local custom by which liens were asserted for debts and liabilities not enumerated in the statute. Certain specific creditors have by a special statute, liens on steamboats for their debts, and for other debts of their owners they may be seized and sold under the general law on the subject; and a custom of a particular place which would secure to creditors of the actual owners of steamboats preferred liens on such boats for the price of produce, or other articles sold to said owners to be transported by freight, or to earn freight, might be reasonable and just, while to make them liable by special lien, or otherwise for the debts of persons not the owners, would be altogether unreasonable.

Customs and Usages—Special Customs—Contracts.

Special customs so often create confusion of legal rules in directions not contemplated in their adoption, they are to be admitted into the law with great reluctance; and it cannot often be a hardship to parties to reject a custom, so long as they are left free to make their own bargains, and can if they are disposed to do so, incorporate the custom into their contract, as a part thereof.

Same—Custom Must Be Certain and Reasonable.

To make a custom and usage a bona fide one, it is a pre-requisite that the custom was certain and that it was a reasonable one. And of the latter, where parties would charter a steamboat, they could purchase articles to transport on it more valuable than the boat itself, and if it should be liable for the price, the property of the owner could be incumbered and put to hazard, by the reckless conduct of an insolvent bailee.

Pleadings—Allegations of Petition—Customs and Usages—Uniformity a First Requisite to Constitute.

Uniformity being the first requisite in the establishment of law by custom, a petition that alleges in substance that, in the case of furnishing a steamboat with goods and supplies for speculation by parties thereto, or to produce freight for the boat, that in all such cases steamboat men, merchants and others at Paducah, Ky., and up the Tennessee river, regard the boat liable for such debts, and that it has been so long acquiesced in that it has become a well established usage, and that it is a valid custom is held not sufficient to establish that the custom was uniform and general.

APPEAL FROM M'CRACKEN CIRCUIT COURT.

May 27, 1868.

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OPINION OF THE COURT BY JUDGE PETERS:

This action was brought in equity by appellants against appellees to enforce the collection of a debt evidenced by a due bill, as follows:

“Paducah, June 28, '66.

“\$434.45-100. Due Fowler, Mills & Co. four hundred and thirty-four 45-100 dollars for corn and hay sold *Str.* Jonas Powell.

“C. J. Williams, Clk.”

It is alleged in the petition that the plaintiffs sold on the 8th, 15th and 19th days of May, 1866, to the steamboat Jonas Powell, and owners, said steamer being then a regular packet plying between the ports of Paducah, Ky., and Eastport, Miss., a lot of corn, hay, etc., to the amount named in the due bill, and for which the same was executed. That the contract was made with the captain and clerk of said steamer, and the articles for which the due bill was executed were furnished for the use of the owners thereof.

They allege that said Williams and one C. C. Smedley (since deceased) on the 8th of March, 1866, hired or chartered said steamer from the owners, Norton, Patton and others, for the term of six months, with the privilege of extending the time three months longer, said boat to be returned at the end of the term, in good order, *and free from debts, and incumbrances*, and that the defendant Dorsey Smedley *guaranted* in writing the faithful performance of the undertaking and agreements of the said Williams, and C. C. Smedley; that under said contract said steamer was run as a packet up the Tennessee river from Paducah, Ky. The charter contract is referred to, and made part of the petition.

They further allege that on the 2nd of June, 1866, the defendant Dorsey Smedley, by a contract with C. C. Smedley, and said J. C. Williams, got a transfer of the charter party, and the privilege of running the boat for the unexpired term, that they had to run it, in consideration of which he obligated himself to pay off and satisfy all the debts and liabilities of said boat, contracted either before or after the transfer to him, and agreed to look to C. C. Smedley and J. C. Williams individually for the debts he might be required to pay, by reason of his contract, and which had been incurred during the time they run the

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boat. They refer to the deed of transfer, and make it a part of the petition.

That in August, 1866, C. C. Smedley died insolvent, and that J. C. Williams is insolvent also. That D. Smedley before the expiration of the term for which it was chartered ran said boat out of and beyond the jurisdiction of the court, and it still remains beyond the jurisdiction of said court.

That at the time of the sale of the articles named in the due bill, they knew C. C. Smedley the captain, and J. C. Williams the clerk, were insolvent, and did not give them credit for the produce, but debited the price thereof to the boat itself, and looked to it for their pay, and conclude the paragraph in these words:

“and that in all cases of similar nature, it is the boat herself that is regarded as good for the debt, and that the habit of regarding the boat as liable *for the debt* of that character up the Tennessee river from *this point* has been acted upon, and regarded by the steamboat men and others *here in town*, and on said river, that it has now from the length of time, certainty, etc., grown up to be a well established usage.”

In the 3rd paragraph, the plaintiffs allege that the produce was purchased to take up the Tennessee river, to supply the deficiency of lading, and by a profit on the sale thereof, to make the freight, which is customary with the owners, and masters of boats navigating that river, in order to render the business remunerative. And by the amended petition it is alleged that by the usage and custom of the trade such boats so employed did buy supplies (hay and corn included), for the accommodation of their customers upon the river, and such purchases were made with a view to freight, that it was customary, and the usage of trade, for merchants and others at Paducah to sell to such packet boats, such supplies, and the boat became chargeable with and liable therefore, and that said custom was valid, certain, notorious and reasonable. Wherefore, they prayed to be sustained to all the rights of a creditor against said Dorsey Smedley, and for a judgment against him, and for general relief.

To the petition Dorsey Smedley put in a demurrer, which was sustained, and the plaintiffs failing to plead further, their petition was dismissed as to him, of which ruling they complain.

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The sole question, therefore, is, whether the allegations of the petition to charge appellee with the debt.

For debts created as this was, by the purchase of articles for speculation, or to earn freight, the statute gives no lien on the boat. It is not alleged that appellee was a party to, or interested in the contract for the produce, nor is he an obligor on the due bill given for its price. If therefore he can be made responsible for the debt, it must be done by some change in the settled law of contracts, which, as is contended by the counsel for appellant in his very plausible argument, has been done by the usage of trade, and custom, in the city of Paducah in reference to this particular class of debts.

The proposition is not controverted that the rule of law in relation to contracts may be changed by the usages of trade and custom in particular localities; but the question is, are the facts stated in the petition, and admitted to be true by the demurrer, sufficient of themselves to change the rule, and abolish a local custom as the governing rule in this case.

Before a custom can become a law, it must appear that the usage has been general and uniform, and the custom peaceably acquiesced in, not subject to contention and dispute. Brown's Legal Maxims (5th Am. ed), 823; Oebrich v. Ford, 23; How., 49.

Uniformity, then, is the first requisite in the establishment of a law by custom; it is not alleged, in substance, that in all such cases steamboat men, merchants and others at Paducah, and up the Tennessee river, regard the boat liable for such debts, and that it has been so long acquiesced in that it has become a well established usage, and that it is a valid custom, by which the pleader is understood to mean, a custom enforceable, or valid as a law, and cures the omission to state that the custom was uniform and general.

It is alleged that the custom was certain, and the facts stated may be regarded as sufficient to authorize the conclusion that it was certain, which is the 2nd requisite to a good custom.

But whether the facts stated make the custom a reasonable one, which is the 3rd requisite to a good custom, is a much more difficult and serious proposition.

Certain specific creditors, have by a special statute, preferred liens on steamboats for their debts, and for other debts of their owners they may be seized, and sold under the general law on the

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subject, just as other property is liable for the satisfaction of the debts of owners; and a custom of a particular place which would secure to creditors of the *actual owners* of steamboats, preferred liens on such boats for the price of produce, or other articles sold to said owners to be transported for freight, or to earn freight, might be reasonable and just, while to make them liable by special lien, or otherwise, for the debts of persons not the owners, would be altogether unreasonable; parties chartering a steamboat could purchase articles to transport on it, more valuable than the boat itself, and if it should be liable for the price, the property of the owner could be incumbered, and put to hazard by the reckless conduct of an insolvent bailee.

It is not alleged that by the local custom of Paducah, and up the Tennessee river, steamboats can be subjected to the payment of debts contracted for produce, and articles purchased for freight to be transported, by mere bailees—and even if it had been alleged, a custom so unjust to owners and unreasonable should not be sanctioned and enforced by courts of justice.

The allegation that D. Smedley had by his contract undertaken to pay the debts and liabilities of the boat is to be understood as an obligation to pay such debts and liabilities as were liens on the boat for their payment, and as this is not of that character, it is not embraced in the agreement.

As was said in *Strong vs. Grand Trunk Railway Company*, September No. 1867, A. L. R., 680, special customs so often create confusion of legal rules in directions not contemplated in their adoption, they are to be admitted into the law with great reluctance; and it cannot often be a hardship to parties to reject a custom, so long as they are left free to make their own bargains, and can, if they are disposed to do so, incorporate the custom into their contract, as part thereof. We are of the opinion for the reasons herein stated that the answer was insufficient.

But even if we should be mistaken in this view of the case, the statute giving liens on steamboats for certain specific debts, would operate to destroy any local custom by which liens were asserted for debts and liabilities not enumerated in the statute.

Wherefore, the judgment is affirmed.

Campbell & Bullock, for appellants.

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SPRAY ET AL V. GEORGE CLAYTON'S ADMINISTRATRIX.

Sale of Personal Property—Warranty of Title—Possession.

No cause of action accrues on a warranty of title to personal property, until it is taken from the purchaser by the real owner, and unless a defendant alleges that some one had asserted a title to the property, or that his possession had been disturbed, he could not show a breach of warranty.

Instructions—Personal Property.

A defendant to a suit to recover the purchase price of personal property, asked for an instruction, that if the jury believed from the evidence that the title to the property for which the note sued on was executed, was not in the vendor, but in some other person, they must find for defendant, unless they believed he had been authorized by the owner to make the sale: Held to have been properly refused, where no breach of a special warranty of title is shown.

APPEAL FROM DAVIES CIRCUIT COURT.

May 21, 1868.

OPINION OF THE COURT BY JUDGE PETERS:

This action was brought by appellee, administratrix of George Clayton, against appellants on a note for \$1,100.

Three grounds of defense were relied upon in the answer. First, that the note was executed for the price of a slave purchased by appellant Spray of appellee's estate, who warranted the title to the slave, and that he had no title to him at the time of the sale. Second, that he warranted him to be sound and healthy, when he was unsound and afflicted with divers dangerous diseases, and especially with a disease called scrofula, of which he in about three months and a half thereafter died. Third, that he warranted said slave to be only sixteen years old, when he was in fact then twenty years of age, and pleaded said defenses "as a counter-claim and set-off against the plaintiff's demand."

Appellee admits in her reply that the note sued on was executed for the price of a slave, and that there was a warranty of title, of soundness, and that the slave was of the age of sixteen years old,

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but claimed that the vendor had no title to the slave, denied he was diseased, or unsound, or that he was twenty years old, and alleged he was only sixteen years of age at the time of the sale, and furthermore alleged that before the sale she owned the slave and invested her intestate, who was her son, with the title to enable him to sell him, and after the sale was made, she ratified it.

The issues formed by the pleadings were submitted to a jury, who found a verdict for the plaintiff and a judgment was rendered in conformity thereto, and appellants filed grounds and moved the court for a new trial, which motion was overruled, and they have appealed.

It is assumed by appellant's counsel that the vendor of the slave had no title to him at the time of the sale; that the ratification set up in the reply must be understood to take effect, or as intended to take effect from and after the time the same was filed, and after the negro was dead, which could not cure the pre-existing breach; consequently the plaintiff below was barred of her action, and the first, second and third instructions asked by them should have been given, which are:

1. That upon the whole case the jury ought to find for the defendants.

2. If they believe from the evidence that the title to the slave for which the note sued on was executed, was not in intestate George Clayton, but in some other person, they must find for the defendants, unless they believe he had been authorized by the owner to make the sale.

3. That no assent to the sale by the real owner in a reply filed in the pleadings after the death of the negro sold, could make valid a sale without authority.

Appellants relied upon an express warranty of title, and filed the bill of sale of their vendor with his covenant of warranty; can the defense be available without an allegation of eviction or something equivalent thereto? In *Siptov vs. Triplett*, 1 Met., 270, where one of the grounds of the defense to the note sued on, which was executed for a part of the price of two slaves, was a breach of warranty of title, this court said. The pleadings render it somewhat uncertain, whether the purchaser relied upon an express warranty of title, or upon the warranty of title which the law implies on a sale of chattles in the possession of the vendor. If he meant an express warranty of title, then no cause of action accrued

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on it until the slaves were taken from the purchaser by the real owner, and as the defendant did not allege that any person had asserted a title to the slaves, or that his possession of them had been disturbed, he failed to show any breach of warranty. The question having been directly and authoritatively settled, the instructions No. 1 and 2 as asked were properly refused. And if it be conceded that the appellants' counsel properly interpreted the reply and the ratification of the sale therein alleged was intended to apply to the time the reply was filed, still they were not prejudiced by the refusal to give instruction No. 3. Because as the possession and title of appellant Spray were never disturbed, it was not material whether the sale was ever ratified or not.

The court on the motion of appellee instructed the jury that if they believed from the evidence that the boy George descended to Mrs. Susan Clayton (the plaintiff) after the 23rd of February, 1846, the title to him vested absolutely in her, and not in her husband, and after his death she had the right to sell, or otherwise dispose of him as she thought proper.

There was evidence conducing to prove that Mrs. Clayton got the slave by descent after the act of February, 1846, for the protection of married women's right, and no available objection is perceived to said instruction.

The two instructions given by the court as appears from the record without being asked for by either party, related to the question of the unsoundness of the slave, and the mode of adjusting the damages if they should find from the evidence that the slave was unsound at the date of the sale and the mode of estimating them, and they conform to the law on the subject.

Wherefore, the judgment is affirmed.

Kincheloe & Anthony, for appellants.

Sweeney, for appellee.

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WILLIAM STEELE v. S. A. STEELE ET AL.**Assignment for Benefit of Creditors—Duty and Liability of Trustee.**

Where a trustee prevents the consummation of a judicial sale of trust property by asserting an unfounded claim against it, and the property is therefore resold, he will be held responsible to the creditors for the difference in the price which it brought at the last sale and the amount bid at the first sale.

Same.

A trustee has no right to purchase trust property at a judicial sale and pay for same out of trust funds, unless authorized by the creditors.

Same—Sale of Debts without Consent of Creditors.

A trustee has no right to sell debts owing the assignor at a sacrifice, without the consent of the creditors.

Same.

A trustee had no right to consent to the assignor collecting the debts without the consent of the creditors.

Same.

A trustee had no right to consent to the assignor collecting the debts transferred to him as trustee, and was properly held responsible for same.

Same—Preferring Creditors.

A trustee is not entitled to the exclusive privilege of having the debts of the assignor, for which he was bound, as surety, paid in full before the other creditors are allowed to participate.

APPEAL FROM HENDERSON CIRCUIT COURT.

May 28, 1868.

OPINION OF THE COURT BY JUDGE WILLIAMS:

So far from its being the duty of William Steele as trustee to purchase in the four lots sold by order of the court to satisfy the

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lien of P. A. Blackwell, it would have been an improper conversion of the trust fund then in his hands. After the lots, however, had been bid off, by Vanbussen, he seems to have prevented a consummation of the sale by the obtrusion of his unfounded claim, which prevented the purchaser from executing bond. Whereupon the commissioner again exposed the lots to sale and Blackwell became the purchaser at the amount of his debts, which seems to have been only one-half of the original cost. William Steele should, therefore, be held liable for the difference of the price which Blackwell gave and the amount which Vanbussen bid. William Steele, so far as the evidence shows, made no mention of his claim until about the time Vanbussen was about to execute bond, therefore he could not have injuriously affected the first biddings, and as he was not bound as trustee to bid in the property for the benefit of either the insolvent debtor or his creditors his utmost liability is the difference between the two bids.

Either Salem A. Steele or his creditors could have had the property bid in, or the creditors could have authorized the trustee, William Steele, to purchase it with the trust funds, without such authority, however, it was not his duty to do so, but really to refrain from so doing.

It was, therefore, erroneous to adjudge against him the difference between the price for which these lots sold under judicial sale and the purchase price given, or what witnesses might estimate the reasonable value at.

Salem A. Steele not only authorized William Steele, as his trustee, in the deed of trust to sell any of his property at his own discretion, but joined in the deed to Clay for his undivided half of the store house and lot, and it by no means clearly appears that the sale was at a sacrifice, and as Salem A. Steele's estate demanded cash means to save other property from being sacrificed under execution sale, we are not prepared to say William Steele should be held for any more than the amount of his actual sale, and this error will be corrected on the return of the cause.

As trustee and without the consent of the creditors, he had no right to sell the debt on J. M. Dodd for \$1,080 at a sacrifice of about \$200, and he has properly been charged with the full amount thereof.

Nor had he a right to consent or let Salem A. Steele collect the debts transferred to him, as trustee, on Rutherford, McLean

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Sweek, or other person, and he was properly held responsible for these debts, together with the moneys actually collected by him on other debts.

The dwelling house and three lots sold by execution against Salem A. Steele and purchased by William Steele previous to the deed of trust, were so purchased mainly by means furnished by Salem, and the trustee was properly charged with the amount he so recovered and credited by the amount he actually paid out thereon; and the dwelling house and lots were properly ordered to be sold for the benefit of the creditors.

And the trustee was also properly chargeable for the rents received by him from the time he got possession of the house, but as this house and the lots were not conveyed in the deed of trust William Steele should not be charged with rents anterior to his getting actual possession.

Salem A. Steele continued for a long time to reside in the house, as he had a right to do, until legally ousted, without paying rents, and even had it been included in the deed, the trustee should not be charged for his use and occupation; this error will be corrected on the return of the cause.

William Steele is not entitled to the exclusive privilege of having the debts, for which he was bound as Salem A Steele's surety, paid in full before the other creditors shall be allowed to participate; for such debts as may have been in execution and actually in the sheriff's hands, and a lien created thereby, when the deed of trust was made, if any there be, which he has had to pay, he may be entitled, by subrogation, to the creditor's lien, but this is the only principle upon which he can claim priority.

If there were any such debts, he should be permitted to manifest them. His services, like the other costs, should be allowed and paid before a pro rata distribution, and then with the exceptions herein stated, the assets of Salem A. Steele should be distributed pro rata among his creditors, including the debts paid by William Steele, since the deed of trust. Salem A. Steele was clearly legally interested in making his assets in his trustee's hands as large as possible, and making them pay as much as possible of his indebtedness, and therefore not a competent witness for his creditors, but no exception to reading his deposition appears of record, and indeed the result would be the same as if it had been excluded, for nearly all

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of his statements of facts are also established by others. No other errors are perceived.

Wherefore, the judgment is reversed, with directions for further proceedings as herein indicated.

William Steele, for appellant.

Yeaman, for appellees.

C. E. SOUTHARD ET AL V. EMILY PAGE ET AL.

Land—Title—Unrecorded Deed—Possession.

A party in actual possession, holding under an unrecorded deed has a superior title to one claiming under a subsequent deed, which has been recorded.

Judgment Against Vendor Binding on Vendee.

A judgment against a vendor is binding on him and his vendee until reversed.

APPEAL FROM LOUISVILLE CHANCERY COURT.

May 25, 1868.

OPINION OF THE COURT BY JUDGE WILLIAMS:

In a suit of Cushing's administrator vs. D. R. Southard and others a litigation sprang up and was adjudicated between L. A. Whitely and C. O. Page, as trustee for appellee, both claiming to be vendees of James D. Southard to $27\frac{3}{4}$ acres of land in Jefferson county. The latter by an unrecorded deed dated November 7, 1850, *with actual possession*; the former by recorded deed dated April 3, 1854.

This litigation resulted in a decree rendered January 3, 1857, establishing the unrecorded deed of C. O. Page, trustee, and adjudging the title of the land to him.

This unrecorded deed from James D. Southard to C. O. Page purports to be attested by four subscribing witnesses, and was filed in said suit.

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One of these attesting witnesses, C. A. Page, is now a lunatic, two others are dead, leaving as the only surviving one capable of testifying, N. Bensinger. To this litigation D. R. Southard, the father of J. D. Southard, was also a party before the court by actual process, as was Whitely, the vendee of said J. D. Southard.

December 2, 1864, more than seven years after the rendition of said judgment, James D. Southard moved the court to set aside the judgment and relitigate the causes of action, and denied the execution of said deed to C. O. Page, and yet in his deposition taken April 25, 1867, he says he is not directly nor indirectly interested in the event of the suit, having conveyed to L. A. Whitely and Mrs. Rawlings. He nowhere repudiates the deed given to Whitely of 1854, though it was executed by his father as attorney in fact for him, but acknowledges it.

As he really had no interest in the recovery of the land, having parted with the legal title, and his vendee being before the court, it is not perceived why he should be allowed to open the decree of January 3, 1857, even had he moved to do so within the time allowed by the Code, which was not the case.

The judgment of 1854 is binding upon his vendee Whitely so long as it shall stand unreversed, and the time in which he could be allowed to assail it by appeal having long since expired, this effort of his vendor to open the decree is to avoid the legal consequences of said unreversed judgment. The only possible view in which J. D. Southard could be permitted to open said judgment and defend against C. O. Page assertion of title would be because of his liability to Whitely upon his special warranty; therefore, if he had sufficient interest to allow him to open and relitigate the question of title adjudicated in 1854, he had sufficient interest to exclude him as a witness, but he nowhere sets up this as a ground for his litigation. The original deed to C. O. Page as trustee by some means became abstracted from the papers, but a certified copy was preserved; this, together with the judgment of 1857 and the prior and subsequent possession of C. O. Page and the beneficiaries, must prevail over the oral testimony of J. D. Southard and the vague statements of the surviving subscribing witness, especially fortified as they are by the evidence of Homson and others.

Therefore, whether the court was right or wrong in opening the judgment of 1857, it was certainly right in re-affirming it on the

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final hearing and quieting the title of Emily Page under the deed of trust to C. O. Page, and said judgment is, therefore, affirmed.

Brown, for appellants.

Harrison & Bennett, for appellees.

F. P. STEWART & Co. v. R. L. GRISHAM.

Pleading—Settlement of Accounts—Failure to Assert in Petition—Evidence.

The failure of a plaintiff to allege in his petition to coerce a settlement agreed upon between the litigants, that such a settlement had been made, will debar the introduction of evidence in regard thereto. And the failure to assert the settlement is conclusive of its non-existence.

APPEAL FROM CHRISTIAN CIRCUIT COURT.

May 22, 1868.

OPINION OF THE COURT BY JUDGE ROBERTSON:

The conflicting testimony as to the settlement is not so irreconcilable as to make it necessary to impeach the credibility of any of the witnesses. The Penningtons on one side and Grisham on the other, concur as to most of the statements and admissions of the parties while negotiating a settlement. The Penningtons *inferred* that, on those statements and admissions, the parties concluded a final settlement. But the witness Grisham, while he substantially concurs in the statement of those facts, says that the plaintiff thereon, "claimed that the defendants had made, or ought to have made much more whiskey than he had admitted in the negotiation and that, the defendant Stewart not admitting it, the parties separated without concluding a settlement, and that the plaintiff then requested him to remember the conversation, which implied that no settlement had been made and that a suit was expected. This witness also testified that, after the conversation partly detailed by the Pennington witnesses, the parties went into the yard for more conversation on the subject, in the absence of the Penningtons, and, failing to conclude any adjustment, sepa-

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rated without any further negotiation. And the Penningtons did not know the result of that last conversation. They probably interpreted the agreement as to facts stated in their presence as a final settlement, and they stated no other reason for construing the conversation heard by them as such settlement. But the witness Grisham, who had a better opportunity to hear all the conversation, derived his opposing conclusion from not only the declarations of the parties in the house, but afterwards in the yard, the last of which the Penningtons did not hear. His conclusion, therefore, is most rational and credible, and the more especially as the retirement to the yard for further negotiation implied that no final settlement had been made in the house, as only inferred by the Penningtons. The only conflict, therefore, is between inference and knowledge—opinion and fact, and consequently the testimony of Grisham does not essentially conflict with that of the Penningtons and is not even neutralized by it.

But the significant fact that the appellants in their pleadings did not allege, or even intimate any settlement, is decisive against it. Without allegation, proof was admissible had the testimony preponderated in their favor. And the failure to assert any settlement is conclusive of its non-existence.

The evidence seems to sustain the commissioner's report and to have also authorized the court to add to the balance reported against the appellant as much as it did for the product of the damaged wheat, and especially as it may have been damaged by the delay and negligence of the appellant Stewart.

Wherefore, the judgment is affirmed.

Landes & Ritter, for appellants.

Phelps, Feland & Evans, for appellee.

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JOHN G. JACK'S WIDOW ET AL V. GEORGE W. BAYLESS.

Decretal Sales—Extorting Money by Threatening to Open Bidding—Fraudulent Representations.

At a decretal sale in the city of Louisville, where the land was sold to Geo. W. Bayless, for \$9,175, whereupon one Arthur Peter threatened that unless he was paid \$500, by Bayless he would reopen the sale and bid in the property, and the amount was paid him. This petition was filed by the heirs for whom the sale was made, to cancel same on the ground of a fraudulent combination between Bayless and Peter to keep others from bidding on the property. While the appellate court would rebuke the dishonorable practice of extorting money by threatening to open bidding, unless the parties to the sale were injured by his conduct, the sale should not be set aside merely to punish them.

APPEAL FROM LOUISVILLE CHANCERY COURT.

June 26, 1868.

OPINION OF THE COURT BY JUDGE ROBERTSON:

Under a decree of the chancellor for selling John G. Jack's house and lot in the city of Louisville to enforce his vendor's lien for an unpaid portion of the consideration, the marshal of the court made the sale on the 15th of September for \$9,175, to George W. Bayless, who was the highest of several competing bidders. The sale was reported to the chancellor October 31st and confirmed November 7th, 1862.

It indisputably appears that the sum bid was the full vendible value of the property at the time of the sale, and, from experiments made for some time before the sale, as well as on the day of the sale, it may be reasonably presumed that no other person would have given as much as Bayless offered.

On the day preceding the confirmation, Arthur Peter offered Bayless \$500 for his bargain, and said that, if he would not accept that advance on his bid, he would offer to open the biddings—unless Bayless would pay him that sum to forbear. Bayless paid him \$500, and he made no motion for a re-sale. And a conveyance was made to Bayless and approved November 14th, 1862.

On the 31st day of May, 1867, this suit in chancery was instituted by the widow and heirs of J. G. Jack for setting aside the sale and conveyance for fraud imputed to Bayless in his arrange-

ment with *Peter*. And, after a negative answer and full preparation, the chancellor dismissed the petition.

The practice of opening biddings of decretal sales was initiated in England, but the chancellors there and the most eminent counsellors in equity from Eldon to the present time have regretted and almost repudiated the practice as generally productive of more harm than good in preventing prudent men from bidding at such sales which may be so easily made fruitless by a subsequent offer of a higher price by some speculating intruder. And in this country the practice has been generally ignored, except in cases of fraud or great sacrifice, and decretal sales have here almost universally been permitted to rest on as stable ground as sales under execution.

But it seems that the chancellor of *Louisville* had adopted a rule for opening biddings on an offer of not less than 10 per cent. on the price offered by the accepted bidder.

And the distinguished counsel for the appellants argued that, even though this court might have reversed an opening in this case merely on the ground that a higher price might thereby be obtained, yet, for the combination between *Peter* and the appellee, characterized by him as fraudulent, the decree ought to be reversed.

While this court would rebuke the dishonorable practice, perhaps too prevalent in *Louisville*, of extorting money by threatening to open biddings, when there is no intention to open, still unless Jack was injured by the conduct of appellee and *Peter*, the sale should not be set aside merely to punish them. And we can neither see nor presume that Peter would have offered to open the biddings, or could have done so, had not Bayless given him the \$500. Peter's purpose only to perpetrate a fraud on Bayless by false pretences is almost transparent. And this is clearly indicated by his answer in this case and other declarations.

There is no proof that he ever promised Jack to open the biddings, or that Jack had any expectation that he would do so. And had he made such an offer it is almost certain that he would have failed. As he preferred to take \$500 we must presume that he would not have made a bid of more, and the chancellor would not have disturbed the sale for only about half of his 10 per cent. And had the property been worth 10 per cent more than Bayless' bid, we could not doubt that *Jack* could have procured some person to offer that advance for opening the biddings.

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Then waiving the pregnant facts that Jack never sued in his lifetime, and that the appellants slumbered for five years after the confirmation of the sale until the property, by valuable improvements and the rapid rise of value, which more than duplicated the price given by the appellee, it does seem to us that justice neither suggests nor would permit a decree cancelling the conveyance to the appellee.

Wherefore, we approve the chancellor's decree dismissing the petition, and must affirm it as right and equitable as between the parties.

Judge Williams not concurring.

Worthington, Bullitt, for appellants.

Woolley, for appellee.

ABNER PERKINS v. SAMUEL SMITH ET AL.**Coroner's Deed—Evidence of Title—Authority to Execute—Peremptory Instructions.**

Where neither the judgment, nor execution under which a coroner's deed purports to have been made, even offered in evidence, which was necessary to render the deed competent, a peremptory instruction is proper.

APPEAL FROM RUSSELL CIRCUIT COURT.

September 19. 1867.

OPINION OF THE COURT BY JUDGE HARDIN:

The coroner's deed offered in evidence by the plaintiff having been rejected, and, thus consequently being no evidence of title in the plaintiff before the jury, the peremptory instruction of the court to find for the defendants was manifestly right. But the main question to be determined is, whether or not the court erred in refusing to permit said deed to be read. Neither the judgments, nor executions under which the coroner's deed purports to have been made, were made, or offered to be made in evidence. It was clearly necessary to do so to render the deed competent evidence of

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title. This principle has been repeatedly and authoritatively recognized by this court. *Smith v. Moreman*, 1 Monroe, 154. *Stephens, etc., vs. Robertson, etc.*, 3 Monroe, 99, and *Riggs vs. Dooly, etc.*, 7 B. Monroe 238.

It is deemed unnecessary here to enquire to what extent or under what circumstances a coroner is clothed with the authority of a sheriff to sell and convey lands under execution, as the deed, had it been made by a sheriff should not have been made without the production also of the judgment, execution and return of sale which could alone have authorized the conveyance.

The judgment is *affirmed*.

Vanwinkle & Hays, for appellants.

Alexander, for appellee.

MARY HUBERT v. PETER HUBERT.**Divorce—Abandonment for One Year—Weight of Evidence.**

Where the weight of the evidence shows an abandonment of the wife by the husband for one year before the commencement of an action for divorce, it is sufficient to entitle the wife to the relief sought.

APPEAL FROM LOUISVILLE CHANCERY COURT.

November 21, 1867.

OPINION OF THE COURT BY JUDGE PETERS:

The evidence in this case is certainly conflicting and irreconcilable, but taken by the appellant is more consistent, and presents a more rational, and therefore a more credible, history of the domestic troubles which ultimated in a separation of the parties, than does that of the appellee.

There is some apparent difficulty on account of the discrepancy of the testimony as to the time when appellant was abandoned by her husband, but the preponderance of the evidence fixes the time in October, 1865; a witness who lived with appellant states that she and her husband lived together about 8 months, that they were

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married the 16th of February, 1865, that he left about the middle of October of the same year; two other witnesses prove that he left in September or October, 1865, and others prove he left some time in the fall of that year. Appellee's brother and his wife prove that he brought his trunk to their house on the 28th of November, 1865, and Mrs. Becker proves it was the 8th of the last named month; he might have separated from his wife a month or more before he took his trunk to his brother's. This action was brought on the 9th of November, 1866. The abandonment, according to the weight of the evidence, had been one year before the commencement of this action by appellant. Which according to the statute on the subject entitles her to a divorce.

The judgment of the chancellor must, therefore, be reversed, and the cause remanded, with directions for the court below to render judgment divorcing appellant from appellee.

Greene, for appellant.

Stirman, for appellee.

SAMUEL E. COTTRILL v. GEORGE W. KINSER.

Actions—Failure to Prosecute Suit—Damages—Sufficient Evidence—Breach of Bond.

In an action in equity on the bond of the plaintiff in a replevin suit for his failure to prosecute same, the loss the defendant therein might have sustained for a breach of the bond was a subject of proof, and he must show that he had been deprived of his property, and the extent of the loss therefrom by proving the value of the property replevied. A mere judgment for the face of the bond, for the alleged breach, is not sufficient.

APPEAL FROM KNOX CIRCUIT COURT.

June 8, 1868.

OPINION OF THE COURT BY JUDGE PETERS:

Prior to the institution of this action, one John Norrell brought an action against appellee for a black horse of the alleged value

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of one hundred dollars, and having made the affidavit and executed bond as provided in *Sec. 208 Civ. Co.*, with appellant his surety, procured an order for the delivery of the horse to him.

In the bond thus executed the obligors covenanted that Norrell should duly prosecute the action, and perform the judgment of the court therein, by a return of the horse if restitution should be adjudged, and by paying Kinser such sums of money as might be adjudged to him not exceeding \$120 and his costs expended.

This action was brought in equity on the bond of Norrell and appellant for a failure to prosecute said action with effect, to return the horse sued for, and it is alleged that Norrell dismissed his action after having obtained possession of the horse under the order for delivery, and in the answer it is admitted that the action was dismissed, but the judgment of dismissal is not found in the record.

On final hearing judgment was rendered by the court below against Cottrill for \$100, and he has appealed.

From the evidence it appears that Norrell went with the sheriff to Kinser, who then had the horse in his wagon taking a load of salt to Tennessee, and there, in the presence of the sheriff, he without taking the horse from the wagon, agreed with Kinser, that he should work the horse to Tennessee, and it is admitted in the answer the horse was then delivered to Norrell.

It is not alleged, or shown that, in dismissing the action, there was a judgment for a return of the horse to Kinser, or for his value, or for any damage for his detention; the breach of the bond consequently consists in the failure of Norrell to "*duly prosecute*" his action—what loss Kinser sustained thereby, was a subject of proof, and if he was deprived of his property in the horse, he should have shown the extent of his loss, by proving the value of the horse, which was not done; and the evidence was insufficient to authorize the judgment.

The action was brought in equity, and as there was no motion to transfer it to the ordinary docket the judge could properly try it. Upon the return of the cause the parties should be permitted to amend their pleadings, and make additional preparations if they should propose to do so in reasonable time. But for the reasons stated the judgment is *reversed*, and the cause remanded for further proceedings consistent herewith.

Herndon, for appellant.

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E. J. SMITH ET AL V. R. C. LADY ET AL.

Wills—Incapacity of Testator—Undue Influence—Age—Disease.

A testator, in making his last will and testament, unequally distributed his estate amongst his children, excluding entirely two of them, in disregard of a previous expressed intention to make provision for them in at least, an equal share of the estate. Other more fortunate children, as shown by evidence, compelled the testator, who was aged, and physically infirm, but of sound mind, against his expressed wish, to send one of the children away from his home and deny her his hospitality, at a time when she was prostrated by sickness, and had been previously taken by her father, the testator, to his home to receive such treatment and care as her condition required. Held to show such undue and improper influence over the mind of the testator, as to render void the will excluding two of the children from participation in the estate.

APPEAL FROM LYON CIRCUIT COURT.

May 23, 1868.

OPINION OF THE COURT BY JUDGE HARDIN:

A paper propounded as the will of Benjamin Bambray, deceased, having been adjudged not to be the last will and testament of said decedent, this appeal is prosecuted from that judgment by parties named as devisees in the supposed will.

The establishment of the will was contested by part of the heirs on the ground of incapacity in the testator and undue influence exerted upon him by E. J. Smith and wife and others, preferred as devisees.

As to the testator's competency to dispose of his estate by will, it may suffice to observe, that although he was over 80 years old, and physically infirm, it appears by a decided preponderance of the evidence that he was of sound mind when the will was made, and capable of making a rational disposition of his property, if left free to do so according to his own judgment and wishes.

But although age and disease had not destroyed the testator's capacity, they had certainly impaired it, and rendered the will of Brambray more liable to be overcome and controlled by those who possessed his confidence and might seek to abuse it.

Smith appears to have possessed his confidence, and there is

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evidence in the record strongly conducing to show that he employed the advantage it gave him, to prejudice Bambray against George Lady, another son-in-law; and both Smith and his wife, and some of the other devisees, are shown to have attempted to induce said Bambray to distribute his estate to the exclusion of his daughters Catharine Lady and Martha Lady. And there is evidence in this record conducing to show that Smith and his wife had acquired such controlling power over Bambray as to compel him against his own expressed wish to send one of his said daughters from his house and withhold from her his hospitality, at a time when she was prostrated by sickness, and had been taken by her father to his home to receive such treatment and care as her condition required.

There is evidence in this record that Bambray when younger and less susceptible to improper influences, intended to make, an apparently more just and equitable division of his estate than that which is directed by the will in contest. The apparent harshness with which the two daughters Catharine and Martha Lady were entirely excluded, in disregard of a previous intention to give them at least an equal share of the estate, is not explained in the will, or otherwise, unless it be by the facts and circumstances importing the exercise of an undue and improper influence over the mind of the testator by the devisees named in the will.

We are of the opinion that the verdict and judgment in the court below were in accordance with the preponderance of the evidence.

Wherefore, the judgment is affirmed.

Scott, for appellants.

James, for appellees.

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C. D. SHEAN v. J. W. FLETCHER ET AL

Lands—Judicial Sales to Pay Purchase Money—Recission.

A sale of lands under an order of the court, bond executed by the purchaser, and the sale confirmed without exception to the commissioners report filed prior thereto, is not susceptible of recission, unless the purchaser be prejudiced by being required to pay more than is adjudged in his sale bond.

APPEAL FROM HARDIN CIRCUIT COURT.

May 21,, 1868.

OPINION OF THE COURT BY JUDGE PETERS:

Thomas G. Livers and James G. Parsons about the year 1833 purchased by executory contract jointly of Robert Fletcher a tract of land in Hardin county, containing four hundred and ninety-five acres; they agreed to pay, each, one-half of the purchase money, and executed their separate notes for the deferred payments, and also agreed upon the mode of dividing the land.

Parsons sold his half of the tract to Brooks, and about that part there is no controversy. Livers assigned Fletcher's bond for title to appellee Warren Mitchell, and seems to have executed a bond to appellant Shean for the same land.

Mitchell, after having procured the assignment of Fletcher's bond, brought this action against Fletcher, Livers, Shean, Parsons, and his vendee Brooks for a title. Parsons and Brooks went out of the case as not being interested. Fletcher, in his answer, admitted the execution of the bond filed by Mitchell to Livers, and offered to make the deed to the land to whom the court would adjudge it should be made, alleging that Mitchell and Shean both claimed the land and that he could not safely convey until that controversy was settled. He claimed, however, that \$160.27 cents of the purchase money with its interest from the 20th of March, 1833, were due him and unpaid, for which he claimed a lien on the land, and by cross petition sought to enforce it, and to collect his debt. In their answer to Fletcher's cross petition, Mitchell, Livers and Shean admit the indebtedness to Fletcher as alleged

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for the land and his right to enforce the vendor's lien for the satisfaction of his debt, but Mitchell alleges he paid to Fletcher as part of his debt the sum of about thirty-eight dollars (\$38).

After judgment had been rendered in favor of Fletcher's administrator for the amount due her and a sale of 95 acres of land to pay the same, and W. Mitchell purchased, on motion of Shean that sale was set aside. And on the 3rd day of December, 1855, a second sale was ordered of said land, or so much thereof as should be necessary to pay Fletcher the sum of \$287.19-100 with interest from the 15th of January, 1864, till paid, which was the amount then adjudged due the administratrix of Fletcher from Livers for the land, and William H. Hays appointed commissioner to execute the same. Who did so, and on the 28th of May, 1856, reported to the court the sale, that it was made on the 17th day of March, 1856, as directed by the decree, and appellant Shean agreeing to pay the debt for 39 acres of the land to be laid off on the southwest of the tract the same was knocked off to him, who thereupon executed a sale bond for the amount required to be raised by the decree with John Dillard as his surety, which bond was filed with the report, and on the 5th of June, 1856, no exceptions having been filed to said report, the same was confirmed.

On the 24th of December, 1863, the court below adjudged that Warren Mitchell by virtue of the assignment of Fletcher's bond by Livers was entitled to the residue of the land, which Livers took in the partition with Parsons, after taking 39 acres from the southwest portion and setting it apart to Shean by virtue of his purchase aforesaid and ordered Shean to pay the amount bid for the 39 acres. And of that judgment Shean now complains, with many other rulings of the court during the progress of the case as appears from the numerous errors assigned.

The first error assigned relates to the judgment of the 24th of December, 1863, the most important of which is the rejection of Shean's claims to the land and adjudging Mitchell entitled to it. The bond from Livers to Shean is filed and purports to have been executed on the 13th of April, 1840, in consideration of \$500, the receipt of which was acknowledged. Thomas T. Carrico, the only subscribing witness to the bond, does not prove anything was paid, and although Livers and Mitchell both allege and plead that the bond was without consideration no witness has been called who proves a consideration. And the theory of Shean that he paid for

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the land in debts on Livers is not only positively disproved by Livers, but is also disproved by Dr. Lloyd, who says Livers assigned Shean two notes on him for \$500 each, the greater part of which he paid to Shean in satisfaction of Livers' indebtedness to him, and the probability is he was overpaid. Walker and Stewart both prove Livers' statements in relation to how appellant got his bond for the land, showing that he paid nothing for it, and that evidence is not excepted to, but was read without objection. Mitchell proves he paid a fair and valuable consideration for the land.

The sale and purchase by appellant of the 39 acres was proper, the sale confirmed without exception and he is only adjudged to pay what he bid and undertook to pay therefor, and whether he pays to Fletcher's representative or to her and Mitchell can make no difference to him, he is not prejudiced unless he is required to pay more than he bound himself in his sale bond to pay, and that does not seem to be the case.

As to the sale made by Geoghagan, there was no debt to uphold the judgment under which that pretended sale was made, the debt to Fletcher's administrator has been merged, or extinguished by the judgment and sale of the 39 acres to which Shean purchased.

After an examination of each of the numerous errors assigned, none are perceived prejudicial to appellant.

Wherefore, the judgments are affirmed.

Shean, for appellant.

Helm, for appellees.

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L. H. ROUSSEAU & WELLS v. J. R. MCCLURE, ADMR. OF WELLS.

Dower—Husband and Wife—Descent and Distribution.

The wife has the right to have the lands belonging to her deceased husband cultivated until her dower is assigned.

Landlord and Tenant—Executors and Administrators—Liability of Tenant to the Estate.

A tenant, who was placed in possession by the wife, of lands belonging to her deceased husband, to be cultivated for the year and no objection be made thereto by the administrator, is not liable to the estate for an accounting.

Contract—Wife's Right to Lease Estate of Deceased Husband— Crops.

A contract between a tenant and the wife of a deceased land owner, for the cultivation and making of a crop for the ensuing year, is binding as to the administrator of the estate, who had knowledge of the existence thereof. And she is not held accountable for the products of same, unless it be for such amount as above her dower, not then assigned her, and for her yearly support, and such improvements and repairs necessary to make the crop.

APPEAL FROM CUMBERLAND CIRCUIT COURT.

May 23, 1868.

OPINION OF THE COURT BY JUDGE ROBERTSON:

This case was so irregularly prepared and so imperfectly presented by the records as to make it impossible for the court to decide with judicial certainty, several matters involved in the litigation, and to require further preparation.

The following errors however, are apparent. 1. Rousseau was employed by the intestate's widow, to whom no dower had been allotted, to cultivate the ground, prepare it for corn, when the intestate died, and was by their contract, entitled to one-half of the crop. There is no proof that the product exceeded eighty barrels of corn. The administrator seems to have acquiesced in this arrangement. Rousseau was therefore not responsible to the administrator for the half of the corn, much less for all of it. Yet the circuit court adjudged against him and the widow, \$312.50. Rousseau not being justly liable for any portion of the

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corn, this judgment was entirely erroneous as to him, and is therefore reversed.

2. The same judgment is erroneous as to the widow. It does not appear that the administrator was appointed until the widow had planted the corn, or made any objection to her culture of it, or any preparation to cultivate it himself. Had he planted and cultivated it she would have had a statutory right to one-third of the crop. Her contract with Rousseau, being reasonable and sanctioned by the administrator, Rousseau rightfully took one-half. This, without proof to the contrary, reduced the quantity to 40 barrels, and the third thereof being deducted for her, less than 27 barrels were left. Against the administrator's claim to that residuum, she should have a set-off for repairs necessary for making and saving the crop, and which the record shows that she made at a cost, probably equivalent to the value of the residual corn. But if there might still be a small balance against her, it would be absorbed by her right to corn for food and which had not, according to the proof, been allotted to her. It does not appear therefore, that she was properly chargeable with any amount on account of the corn.

3. The widow, being entitled to two horses, and getting only one, has a right to the price for which the other horse, chosen by her, sold for. By the decree the administrator gets a credit for \$100, as the amount she was entitled to for that horse. And yet we cannot see that he is made accountable to her for any thing on that account. This, if it be so, is clear error.

4. As the record of the alleged settlement of her accounts as guardian of the Armstrong children is not exhibited, we cannot know whether she was allowed for maintainance and service as now claimed by her. If that matter was concluded by the settlement, the decree against her for \$91, as due on that settlement, is right. Otherwise wrong. There should be further investigation of this matter.

5. It does not appear that her whole distributable interest as widow, with two infant children, was allotted to her. She denies that it was. And the administrator has failed to show that it was, or precisely what was allotted. This matter should also be further investigated and more exact justice done on this subject.

In all other respects the decree though questionable, will not be disturbed by this court.

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For the errors suggested, the decree is reversed, and cause remanded for such further preparation and modifications as may be proper according to this opinion.

Harlan, for appellants.

SILAS PRICE V. CYRENA GIX ET AL.

Wills—Construction—Restrictions Imposed—Perpetuities.

A devise under a will to the wife that she should have the sole control of every specie of the estate, to give to whom and when she pleases, during her natural life, and after her decease, every specie of property that could found to be equally divided between the children, is held not to vest the wife with the fee simple title thereto, that she may dispose of the estate to one of the heirs to the exclusion of all others.

Life Estate—Descent and Distribution—Residuary Legatees.

A life estate is restricted to the use of the donee, and cannot be disposed of, even with a power conferred to "give to whom and when she pleases," to one of the residuary legatees exclusively. The right to dispose of the estate, means so much thereof as may be consumed for the devisee's own use.

Same—Alienation of Property Under Devise—Wills—Limitation.

A provision of a will that "after the death of the devisee, every species of the property that could be found," would imply, that should any of the estate be alienated, so much thereof as should remain in kind and could be identified, should be distributed equally among the legatees. This express limitation upon the exercise of a power to dispose of the estate, only during life, is a limitation on the estate, and not on the power conferred by will.

Words and Phrases—Wills.

A restriction in a will, to dispose of property "during her life," is held to mean that the title passed by the devisee, should not extend beyond her death.

APPEAL FROM CARROLL CIRCUIT COURT.

OPINION OF THE COURT BY JUDGE ROBERTSON:

The only question argued in this case turns on the true inter-

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pretation of the will of John M. Price, who owning a homestead tract of land near Carrollton, Ky., on the Ohio river, containing about 250 acres and several slaves and other movable property, and having a wife and several children, made the following testamentary disposition of his estate:

"I, John M. Price of Gallatin County and State of Kentucky, being sound in mind and memory, do constitute this my last will and testament, to wit: That after my decease my desire is that my wife Sally Price shall have the sole control of every species of my estate, to give to whom and when she pleases, during her natural life, and after her decease every species of my property that can be found, to be equally divided between my children. In testimony whereof I have hereunto set my hand and affixed my seal this 18th day of November, 1836.

"John M. Price."

The widow survived the testator 23 years, and, in the mean time, resided on the land, made several dispositions of movable things, absolutely, and conveyed in fee simple, the entire tract of land to her son, Silas Price, who lived with her and helped to manage her affairs. After her death her other children asserting claim to the property, thus alienated, by her, brought this suit for distribution among all the testator's descendants.

The circuit court decided that the widow had no power to pass an absolute title beyond her own life. And Silas Price alone appeals from that judgment.

The vagueness and unskilfullness of the phraseology of the will make the testator's true intent rather vexatiously ambiguous, and might with some plausibility lead to opposite constructions. But this court inclines to concur with the circuit judge.

The testator evidently intended that his widow should be entitled to the enjoyment of his whole estate during her life. And it is equally evident that he did not intend that she should have a beneficial interest in it longer than her life. For that term he devised the use, but not the legal title for her own benefit, otherwise, than in the consumption by necessary uses. And it seems to us that, by the power to dispose of any of it during her life, he did not intend such discretionary disposition to deprive his children of the ultimate right to so much of it as should not be consumed by her use of it. This construction seems to be most consistent with the context and spirit of the will, and is apparently

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the only one that harmonises with the provision for a division among all his children after the widow's death of *every species* of his property that could be found," and which seems to imply that, if as he expected, she should alienate it, or portions of it, so much of the alienated property as should remain in kind and could be identified, should be distributed among his children, equally.

And this conclusion is moreover fortified by the consideration that, as she could exercise the power only during her life, that express limitation upon it would have been superfluous, and that therefore, we may reasonably presume that it was intended as a limitation on the estate and not on the power.

Without more minute analysis, or critical elaboration, our judicial conclusion is that the testator, by the restriction "during her life" intended that the title she might pass should not extend beyond her death.

Ultior questions may arise which are not now before this court—the decree being final only as to the construction of the will.

Judgment affirmed.

Pryor & Chambers, for appellees.

Winslow, for appellant.

CHAPMAN DEHONEY'S EXECUTOR v. SUSAN C. DEHONEY ET AL.

Lands and Conveyances—Special Warranty—Estoppel—As to Devisees Under Will—Fraudulent Conveyance.

A conveyance by deed from father to son, with a warranty of title against "himself, his heirs and all persons claiming under him," will operate as an estoppel, not only as to the claims of the grantor himself, but against his devisees, heirs and representatives, and is not subject to a collateral attack except for fraud, or force in the procurement thereof.

APPEAL FROM ADAIR CIRCUIT COURT.

May, 22, 1868.

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OPINION OF THE COURT BY JUDGE PETERS:

In 1826 two patents issued to the heirs of Joseph Chapman on military warrants, for two thousand acres of land each, lying and being in the district set apart for the officers and soldiers of the Virginia State line, south of the Tennessee River. One of said tracts is situated in the County of Hickman, and the other as appears, is located in Marshall County, but of the last named tract nothing need be further said as it is not in controversy.

Mrs. Jane DeHoney, the mother of Chapman DeHoney, was a daughter and heir of Joseph Chapman, and as such, entitled to one-fifth of the land embraced in said patents, at her death she left five sons and one daughter, her only children and heirs at law, to whom her title in said lands descended.

On the 15th of September, 1838, Thomas Dehoney, James Dehoney, Lucy Dehoney, Peyton Dehoney and Joseph Dehoney, children and heirs of Mrs. Jane Dehoney, sold, by executory contract, to their brother Chapman Dehoney, for a valuable consideration, "all their right, title, interest and claim to an undivided fifth interest in said 4,000 acres of land covered by the patents aforesaid. So that by that *contract* Chapman Dehoney *acquired an equity of 5-6 of an undivided fifth*, and being entitled to 1-6 in his own right, owned the entire one-fifth of said lands.

On the writing evidencing the contract of sale from his brothers and sister, to him, is the following endorsement, viz:

"I assign the within article of an agreement to Thomas R. Dehoney, January, the 25th, 1847."

"Chapman Dehoney."

In August, 1854, Chapman Dehoney departed this life in Adair County, where he resided, having first made and published his last will and testament in which he disposed of a large estate, consisting of lands, slaves and personalty, and appointed his son, George W. Dehoney and three of his sons-in-law his executors. His will was probated in the proper court, on the 4th of September, 1854, and the executors therein named qualified, subsequently they all declined to act, except George W. Dehoney who alone is the acting executor.

On the 30th of June, 1847, Chapman Dehoney executed a deed to Thomas R. Dehoney, his son, for the undivided fifth of said 4,000 acres of land, setting out and reciting in the deed with great

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particularity the nature of his title, of whom he purchased, his vendors, his brothers and sister, all being named in the caption as grantors, and they acknowledge in the deed the payment of the consideration to them respectively, by said Chapman Dehoney, describing each tract according to the patent boundaries, and then conclude as follows:

"To have and to hold the said one undivided fifth part of said two tracts of land, each containing two thousand acres, more or less, to the said Thomas Dehoney, his heirs and assigns forever, to their only proper use, benefit and behalf.

"And the parties of the first part hereby covenant and agree to and with the said Thomas R., that they will forever warrant and defend the title to said undivided fifth part of said two tracts of land against the claim, or claims, of themselves, or their heirs forever, but not against the claim, or claims, of any other person, or persons, whatsoever."

This deed signed by the said Chapman Dehoney, was by him acknowledged before a deputy clerk of Adair county court, October 9, 1847, signed and acknowledged by his widow after his death, and signed and acknowledged by his brothers and their wives, except one, and by his sister, the vendors of Chapman Dehoney, on the 13th day of August, 1857, before the county court clerk of Adair county, and by him certified to the clerk of the Hickman County Court, and the same is properly recorded in his office.

On the 24th of March, 1865, this action was brought by George W. Dehoney, executor of Chapman Dehoney, deceased, in the Adair circuit court, by a special act of the legislature of Kentucky, conferring jurisdiction on that court for the purpose, against Susan C. Dehoney, widow, and Thomas Milton Dehoney, infant son and only heir of Thomas R. Dehoney, he having died, and others, to have the deed of said Thomas R. Dehoney cancelled, and to compell them to release and convey said land to said executor, for the benefit of the devisees of C. Dehoney, deceased. And if that cannot be done, then he asks that Thomas R. Dehoney's representative shall be compelled to account for the value of said land, as an advancement to him, in the general distribution of testator's estate.

The court below refused the relief sought, and dismissed the

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petition with costs, and that judgment the executor of C. Dehoney seeks to reverse.

Thomas R. Dehoney perfected his title by procuring partition of the land, in Hickman, to be made amongst those entitled thereto, and the one-fifth set apart to him by metes and bounds, and a conveyance of the same by commissioners, and was in possession at his death, and his widow and heir are still in possession. The consideration in the deed from C. Dehoney &c. to Thomas R. Dehoney is love and affection.

The grounds relied upon in the petition for setting aside the deed are, that the assignment of the bond of 1838 and the execution of the deed were only made to authorize Thomas R. Dehoney to go to Hickman county to clear the title to the land from disputes, and to see to it clear, but that it never was his intention to invest the grantee with the absolute right to the land, as evidenced by the fact that soon after the assignment of the bond the testator took possession of it, and retained it until his death, and that the deed remained in the office of the clerk of the Adair county court from the 9th of October, 1847, till the 1st of August, 1857, without any effort to complete it and to have it recorded in the county where the land is located, and without claim being made to it by the grantee, that he is not charged with the testator with its value, on a book of advancements kept by him with great care and particularity, and called by him his "Family Book," and that his son Thomas R. is a devisee under the will of testator and he cannot claim under and against the will. It is alleged in a very long amended petition that the defendants, Susan C. Dehoney and Milton Dehoney, heirs of said Thomas R. Dehoney, claim said land as their own "*under the wrongful and fraudulent deed herein mentioned,*" but there is not, in any of the voluminous pleading of appellant, a direct charge that the deed was procured by fraud, or force, on the part of Thomas R. Dehoney. And the allegation that, at the time the assignment and deed were made to him, his father was, on account of physical infirmity, incapable of attending to the business, is not only not sustained by evidence, but is most successfully disproved. He made a canvass for the legislature in 1847 and in 1848, in Adair county, and was elected both years, and was an active, vigilant and most successful business man. Nor was appellant in Mexico at the time, as alleged, as an excuse for the conveyance to Thomas Dehoney instead of to appellant.

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Chapman Dehoney conveyed by his deed the whole undivided fifth in said land, to his son Thomas R. Dehoney, and warrants the title against himself, his heirs and all persons claiming under him, and the evidence of title of appellees is of so high a character that it operates as an estoppel, not only against the grantor himself, but against his devisees, heirs and representatives, unless the deed was obtained by fraud, or force, such as to render it void. Jones vs. Prewitt &c., 3 A. K. Mar., 302, 3; Pitzhu vs. Tyler, 9 B. M., 559; Upshaw vs. McBride &c., 10 B. M., 202.

We have already seen that there is neither allegation nor proof of fraud, force, or even mistake, in obtaining the deed to Thomas R. Dehoney.

Nor error is perceived in sustaining, nor in overruling, exceptions to depositions. And even if there was no evidence that T. R. Dehoney had not paid an additional consideration for the land, besides that recited in the deed, which however appears from the statements of said T. R. Dehoney, asked for and proved by appellant, the will itself prohibits an accounting for the value of the land as an advancement.

After a careful investigation of the case, we are unable to perceive any error in the judgment, wherefore the same is affirmed.

Garnett & Baker, Bramlett & Son, Harlan, for appellant.

Caldwells, for appellees.

ROBERT HUME v. W. J. RANKIN & WARNER ET AL.

J. C. SAYERS ET AL v. SAME.

Fraudulent Conveyance—Preference of Creditors—Subrogation—Innocent Purchaser—Purchaser with Notice.

One who purchases property of an insolvent debtor, whose precarious condition was known to him at the time, will be deemed to hold the property in trust for the creditors generally. The payment of part of the purchase money, on the order of the debtor, to a third party, will only give the purchaser a right to be substituted therefor but he cannot claim a lien for such an amount so paid, over the creditors.

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APPEAL FROM GRANT CIRCUIT COURT.

May 29, 1868.

OPINION OF THE COURT BY JUDGE HARDIN :

George W. Nichols being involved in debts amounting to over \$60,000, which exceeded the value of all his estate or visible means of paying his debts more than \$40,000, on the 31st day of December, 1866, sold and conveyed to the appellant, Robert Hume, his farm in Grant county containing about 192 acres of land for the sum of \$12,000, which was, by the contract, to be applied and paid by Hume, first, to the satisfaction of a balance Nichols owed him upon accounts of \$1,500 and to reimburse himself in the sum of \$5,000, which he had advanced for Nichols on the price of tobacco held by him on speculation, thus making Hume's own debt to be retained \$6,500, and the residue of \$5,500 on debts of Nichols on his acceptance of bills in banks of which \$5,000 was paid by Hume in satisfaction of a bill discounted at the First National Bank in Coveington payable at the Merchants National Bank of Cincinnati, dated the 16th of November, 1866, and to be due at 90 days, drawn by S. C. Sayers, payable to and endorsed by J. C. Sayers, and accepted by Nichols, and the balance of \$500 Hume agreed to pay on a bank debt on which other parties were bound as sureties.

It appears also that about the same time Nichols gave an order to said J. C. Sayers, on his commission merchant in Cincinnati, for the balance of the proceeds of his pork in the merchant's hands to partially indemnify said J. C. and S. C. Sayers as his sureties in a debt in the Farmers Bank, of \$3,500, and that upon this order Sayers received \$1,155.21-100 which he paid on the debt in bank.

In these consolidated suits, said sale and conveyances to Hume, and the order to Sayers for the proceeds of pork, as well as certain other dispositions made by Nichols of his property, were alleged by Rankin & Warner and others to have been made by Nichols in contemplation of insolvency, and with the design to prefer the appellants and others in their debts and liabilities for Nichols, as his sureties to the exclusion of his other creditors (Revised Statutes, 553), and the court below having so decided, and adjudged

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that a distribution should be made of the estate of Nichols, among his creditors, as directed by the statute in such cases, said Hume and J. C. and S. C. Sayers have appealed to this court.

That Nichols was fully aware of his insolvency at the date of said transaction is admitted in his answer, and proved by him in his deposition, and from his own testimony, and the other evidence conducing to explain his intentions and objects in making the dispositions of his property, which necessarily gave to the appellants an advantage over his other creditors, the judicial conclusion is, we think, irresistible, that they were made, as alleged, with the design to prefer the parties so to be benefitted thereby to the exclusion of the other creditors of Nichols.

But it is contended for the appellant, Hume, that he occupies the position of a *bona fide* purchaser, for a valuable consideration, paid without notice of the insolvency of Nichols, and should therefore be protected in his purchase, or have a lien on the land for his payments in excess of his own debts against Nichols, although the latter may himself have designed, by the sale and conveyance, to prefer him to the exclusion of other creditors. But without deciding what might be the effect of Hume's payments under his purchase, if the same were made without any knowledge, either of the insolvency of Nichols, or his intention thereby to is, we think, irresistible, that they were made, as alleged, with circumstances disclosed in this record, to conclude, that Hume did not act in ignorance of Nichols' pecuniary condition, nor without participation in the design which prompted him to sell the land.

Although Hume did not reside in Grant county, he appears to have possessed peculiar advantages of knowing Nichols condition, and was largely interested in being so informed. That intimate business and personal relations existed between them, is manifest. Hume did know by his connection with the Farmers Bank that Nichols was very largely indebted to that institution, his relations exclude his other creditors, we are constrained by the facts and on speculation, must in their very nature have apprised Hume of the heavy losses and consequent embarrassments of Nichols, resulting from that unfortunate adventure; and while it had been known in Covington and in Grant county for twelve months that Nichols' pork speculations were proving so disastrous, as in some degree to impair his credit and ability to renew his debts in banks, and he was being dunned and sued for his debts without the ability

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to pay with promptness as he had previously done, it is difficult to perceive how a careful business man, as Hume is shown to be, residing in Covington, where Nichols was well known, could under all the circumstances have been in ignorance of his condition, and the reasons which appear to have influenced him in disposing of his property; and in our opinion Hume was so advised, and made the purchase because the sale to him operated to prefer him, as to the payment of his debt, to the exclusion of the debtor's other creditors.

It is further insisted for the appellants that the judgment is erroneous in not adjudging that they were entitled by substitution to the right of the banks, as against the estate of Nichols, but although it seems that they are entitled to be so substituted, we do not construe the judgment as denying them that right in the distribution of the estate of Nichols yet to be made.

Wherefore, the judgment is affirmed.

Fisks, for appellants.

Carlisle & O'Hara, Rankin, for appellees.

JOHN G. MORTON v. W. C. LANGLEY.

Lands and Conveyances—Lien not Reserved in Deed—Suit to collect—Lis Pendens Purchaser.

John G. Morton purchased of J. R. Cargile a tract of land for a recited consideration of \$1,800. Cargile had purchased the land of W. C. Langley for \$3,436, payable in three notes, accepting a bond for title therefor, and when the first note became due a payment of some \$700 was made, and to enforce the collection of balance of said note a suit in equity by default produced a judgment for the sale of enough of the land to satisfy the amount. Default being made on the second note a like suit was filed. John G. Morton, before his purchase from Cargile, was appointed commissioner by the court to sell the land under the judgment, and at the time of his purchase, told a witness Cox, that he would sell him the land, if he would take such title as he got from Cargile. Langley had made a deed to Cargile reciting "that Cargile has fully complied with the requirements of said bond" and retained no lien therein for the purchase money. This he claims by amended petition to have been a mistake in drafting as none of the purchase money but the \$700 was paid. Held, that Morton was lis pendens purchaser with

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actual notice of the existence of the suit and its objects, having been appointed to carry out the judgment of the court, and by his own voluntary act trying to defeat the judgment he was ordered to execute.

APPEAL FROM HOPKINS CIRCUIT COURT.

May 23, 1868.

OPINION OF THE COURT BY JUDGE PETERS:

On the 29th of May, 1860, appellee sold to one John R. Cargile a tract of about 309 acres of land in Hopkins county for \$3,436 in three equal installments, the first due the 1st of January, 1861, the other two due the 1st of January, 1862 and 1863, respectively, and bearing interest from the 1st of January, 1861.

Seven hundred and forty 74-100 dollars were paid and credited on the note due the 1st of January, 1861, fourteen days after its maturity, and for the residue thereof an action was brought in equity on the 10th of April, 1861, to coerce payment by an enforcement of the vendor's lien by a sale of as much of the land as would be necessary for that purpose. Cargile failed to answer, although process was served upon him, and on the 30th of May, 1863, the petition was taken for confessed, and a judgment rendered for the relief sought; but no sale was made, nor does it appear that said judgment has ever been satisfied.

The two notes, for the remaining installments, having matured; in June, 1863, another equitable action was instituted by appellee in the Hopkins circuit court to collect them by an enforcement of his lien, and on the 4th of December, 1863, Cargile, the defendant, filed his answer in the last action, admitting the execution of the notes for part of the purchase money for the land sold to him by Langley, for which he alleges he has the title bond of the latter, binding him to convey said land with covenant of general warranty, which bond he professes to file, but which is not in the transcript before us. He also alleges that a portion of said land, the number of acres he professes to be unable to state, is claimed and held adversely to the claim of his vendor, and that he has not a good and sufficient title to said land, and cannot therefore make him a title. He furthermore states that previous to the institution of the suit for the first installment, he paid to appellee the sum of two hundred and twenty dollars in addition to the amount credited

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the note, for which he promised a credit, but that he had failed to give him the credit, and asks a credit therefor in this case. He also prays for an exhibition of appellee's title, and if he cannot show a title regularly derived from the Commonwealth, he prays that the contract may be rescinded on equitable terms.

The two actions were consolidated on the 31st of May, 1864, by agreement, and continued until the next term of the court. No other step seems to have been taken in the cause until the 25th of May, 1865, when Cargile filed an amended answer, in which he alleges that he was the sheriff of Hopkins county for the years 1857 and 1858, and in 1857 he appointed appellee his deputy, that appellee was then qualified, and continued to act in that capacity until the fall of 1858, and while so acting, the tax books for said county were placed in his hands to collect the taxes, and he did collect a large amount of revenue tax, county levies and fee bills, which were also put in his, said deputy's, hands to collect; the whole amount thus collected, he says, he is unable to state; but charges it to be as much as six thousand dollars. He further alleges that about the 15th of March, 1859, they attempted to make a settlement of the house of the appellee, in the absence of the tax books, taking appellee's statement as the basis of said settlement, and he then represented that he had only collected about two thousand dollars, which sum was all he then accounted for; the statement of accounts was made out by Roland Gooch, and left in possession of appellee, consequently he was unable to file them; that at that time he believed the settlement was correctly made, relying implicitly on the representations of appellee in relation thereto; but since in his attention has been called to said tax books, and he has discovered that the representations of appellee were untrue, that instead of two thousand dollars collected by him, he had collected over six thousand dollars, and that he owes to him, said Cargile, over thousand dollars, which sum he pleads as an off-set against the demand of appellee. And on the same day, appellant was substituted as commissioner, to execute the judgment rendered in the former action, in place of Samuel Morton, the commissioner first appointed, he having died.

About the 13th of February, 1864, as may be assumed from the certificate of acknowledgement, appellee executed a deed without reference to Cargile his vendee for the land, in which he recites that on the 29th of May, 1860, he executed to Cargile a bond for the

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conveyance of a certain tract of land in Hopkins county, which is more particularly described by reference to the deed of his vendor to him, and then recites:

“for which the said Cargile agreed by his three several promissory notes to pay to the said Langley the sum of \$3,436, the first note due January, 1861, for \$1,146.33 1-3, on the payment of the first note Cargile was to have possession. The second note for the same amount as the first and due the 1st of January, 1862, bearing interest from the 18th of January, 1861. The third note for the same amount as the second, and due the 1st of January, 1863, bearing interest from the 1st of January, 1861.

“Now for and in consideration that the said *Cargile* has fully complied with the requirements of said bond, I have this day granted, bargained and sold, and doth by these presents, grant, bargain, sell and convey unto the said Cargile, his heirs, &c., the land described in said bond,” &c; the boundary is then given, and it concludes with a covenant of general warranty. It was acknowledged by the grantor and his wife before the clerk of the Hopkins county court, and recorded in his office.

On the 11th of October, 1865, Cargile conveyed the land to appellant for the *recited* consideration of eighteen hundred dollars,

“the amount paid by the party of the second part to Rowland Gooch, for money paid by said Gooch as security of the party of the first part in his official covenant as sheriff of Hopkins county to the State of Kentucky, being balance of revenue of Hopkins county, owing to the State of Kentucky, by said party of the first part, for which the party of the second part has delivered to the party of the first part an order drawn by said Gooch for same,”

&c., and warranted the title thereto.

After the execution of said deed, at the May term of the court, 1866, appellant filed his petition to be made a defendant to the action, setting up his purchase, and conveyance, and in obedience to an order of the court, he was made a defendant, and his petition taken as his answer—in which he avers he paid the price for the land as recited in the deed; that he made the purchase in good faith, believing that Cargile had a perfect title to the land, acquired by a deed from Langley dated 13th of February, 1864,

duly acknowledged, and admitted to record in the proper office, who is seeking to subject the same to a claim for the purchase money; but that he is advised he has no lien on the land, and no right to subject it to the payment of the debt claimed; that the deed to Cargile was executed long after all the purchase money had become due, and no lien was retained on the land for its payment, and therefore asks that the petition be dismissed so far as it seeks to enforce a lien on the land for the debt therein claimed, and prays for all appropriate relief.

The deed from Langley and wife to Cargile, and from Cargile and wife to Morton, are filed as parts of said petition.

Appellee filed an amendment to his former petitions, in which he alleges that in writing the deed from himself and wife to Cargile, the words,

“Now for and in consideration that the said Cargile *‘has fully complied with the requirements of said bond,’* were inserted and written through mistake, and under a misapprehension of what words would be necessary and proper, under the statute law of this State, to retain a lien on the land for the purchase money, as the said plaintiff had before the said deed was written proposed in the petitions in the cause to do. Instead of the said words, there should have been written, ‘Now, for and in consideration that the said Cargile *shall* fully comply with the requirements of said bond.’

“The said mistake or error occurred in this way: The plaintiff was ready and willing to make defendant Cargile a deed as proposed in his petitions, and had a conversation with his then only counsel A. K. Bradley, Esqr., as to doing so, in which his said counsel told him that in writing the deed he must state distinctly the amount of purchase money remaining unpaid, and let the deed be made in consideration of defendant Cargile’s subsequent compliance with the terms of his contract.”

The deed was not written by his attorney, but by a deputy clerk, and that he told him to write the deed in compliance with the bond retaining a lien on the land, but he did not observe the inaccuracy in the language of the deed, nor did his attorney, until just at the time said amendment was tendered; that said deed is not written in conformity to their contract, nor are its recitals true, if

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it be construed to mean that the purchase money for the land is paid; it was certainly not his intention in making the deed to acknowledge that the price for the land was paid, or to waive his lien therefor, all of which is and was well known to Cargile, and any effort to give to said deed such effect is fraudulent on his part. That he is insolvent, and if he shall be successful in defeating plaintiff's claim to a lien on the land, the debt will be lost.

That Morton when he accepted said order drawn by Cargile on him in favor of Gooch, well knew the purchase money was not paid for the land, and that appellee was by his action, then pending, endeavoring to coerce payment by the enforcement of his lien, that he has not in fact paid Gooch any money for the land, and that the true agreement between the parties thereto in relation to the payment is that he is only to pay in the event he shall be successful in resisting the asserted lien of appellee, on the final determination of the suit, and that the arrangement is an effort on the part of Cargile fraudulently to prefer Gooch over the rest of his creditors.

Morton in his answer to this amended petition, denies that the words importing that Cargile had complied with his undertakings set forth in the title bond as inserted in the deed from Langley to Cargile, were inserted by mistake, or under a misapprehension of what words were necessary to retain a lien on the land under the statute of the state, and charges that the deed was written by the draftsman as directed by Langley himself, neither he nor Cargile being present, and denies that any instructions were given at the time the deed was written, that it should be written so as to retain a lien on the land for the unpaid price. He denies any knowledge on the subject of whether the recitals in said deed are true, or false, but insists that even if he knew them to be false, that fact could confer no right on Langley which he failed to reserve and secure to himself in his deed. As to the knowledge of Cargile on the subject of the payment of the purchase money, or the intention of Langley in making the deed, he denies any information, or belief in relation thereto, and professes to know only what the deed shows on its face; alleges that he purchased in *good faith*, relying that the deed manifested a clear title in his vendor, free from all encumbrances, reiterates the statement of the indebtedness of Cargile to Gooch in the sum of \$1,800, for which the former drew on him in favor of the latter, and he

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executed his bond to Gooch for \$1,350, to be paid when he could effect a sale of the land, and that no other agreement, or understanding, was ever made in relation thereto; that Cargile is fully discharged from his indebtedness to Gooch, and he is bound to event that he succeeds in defeating Langley in his efforts to subject the land to his debt, or that Gooch was to refund the money in case he lost the land. Denies that in making the conveyance to him Cargile intended to prefer Gooch over the residue of his creditors, or if he had any such purpose, he was ignorant of it. And charges that all statements and allegations in the amended him for said \$1,350, and after a reasonable time shall have elapsed for him to sell said land, he will be compelled to pay him the last named sum. That \$1,800, taking into consideration the condition of the country was near, or at least closely approximated, the value of said land; denies that he is only to pay Gooch in the petition inconsistent with said answer are untrue, and demands proof of the same.

Cargile in his answer denies, that there was any mistake in writing the deed of Langley to himself, or that the words proposed in the amended petition should have been inserted in the deed, instead of those which were inserted. That he knew nothing of the instructions alleged to have been given by Langley's attorney, to him, as to how the deed should be written, and did not know by whom it was written, until he saw Campbell's deposition in the case; denies that the draftsman was instructed to write the deed so as to retain a lien on the land. That the deed, as he alleges clearly expresses the intention of the grantor therein, and does not conflict with any understanding, or agreement between the parties thereto, and denies all fraud charged against him; denies he is *then* indebted in any sum to said Rowland Gooch, for money paid for him as his surety. Alleges that the sum paid by Morton at the time he purchased, was near the full value of the land, and that he paid him the full amount he agreed to pay for the same by accepting the order drawn in favor of Gooch, and says

"he denies that there was any agreement between himself, Morton and Gooch on his part to prefer Gooch to the plaintiff in the payment of this defendant's debts at the time he made the sale of the land to Morton, or at any other time."

On final hearing the court below adjudged Cargile was not

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entitled to anything on his cross action, and claim to a set-off, against appellee, and in addition to the judgment for the amount unpaid on the first installment, at the May term, 1863, of said court rendered judgment against Cargile for the amount of the second and third installments, that appellee had a lien on the land for the satisfaction of said judgment, and appointed a commissioner to execute the same. And from this judgment Morton alone has appealed, calling in question only that part of the judgment which subjects the land, and not controverting the indebtedness of Cargile to Langley therefor.

The deed from Langley to Cargile recites correctly the amount of each installment of the purchase money, and the respective periods at which they matured; but at the date of the deed, all the installments were past due, the last one having matured more than 12 months before that time, and the fact that they were unpaid was not stated, nor was there any lien reserved on the land in express terms in the deed. So that, looking to the deed alone, without regard to the extraneous facts, and circumstances, disclosed, under the 26th sec. Chap. 80, 2 R. S., 230, and the exposition given to that section by this court in Chapman, &c., vs. Stockwell, 18 B. M., p. 650, the inevitable conclusion would be, that the vendor had by the recitals in his deed lost his lien. But when he made the deed, and the same was recorded, he was prosecuting this action to enforce his lien. Cargile in his answer *then* on file claimed to have paid of the purchase money only \$225 more than the amount for which he was credited—charged that appellee had no title to the land, that a part of it was held by another, adversely to him, and called upon him for an exhibition of his title. In a little over two months after this answer was filed, induced thereto by the allegations, that he had no title perhaps, appellee made and acknowledged the deed, and failed to exhibit his derivation of title. But whether the reason assigned for making the deed be the correct one or not, it would be inconsistent and irrational to conclude that he intended thereby to waive or release his lien on the land. His intention, however, could not intervene to deprive appellant of any legal rights fairly acquired under said deed.

More than one year after said deed was acknowledged Cargile filed an amended answer setting up other, and a totally different defense, from that presented in his original answer; but made no

ation of the deed of which it may be presumed he had notice, did not waive the objections made by him in his former answer to the title. Nor is there any evidence that he accepted said deed, or he conveyed the land to appellant, who had been previously appointed commissioner to execute the judgment for the first installment, and who had actual notice of the pendency of this suit at the time the deed was made to him, as he told the witness Cox, he offered to sell the land to Cox, if he would take such title as he got from Cargile.

Moreover, his deed recites that it was made "*in consideration \$1,800, paid by him to Gooch*," and in his petition to be made defendant to the action, and which was taken as his answer, he recites the consideration for the land was "*\$1,800 as recited in the deed*." But in his amended answer, or rather, his answer to the amended petition of appellee, he says that Gooch and Cargile made a settlement, and Cargile fell in his debt \$1,800.

"That *Gooch* drew an order on Cargile for said sum, and Cargile agreed to, and did convey the tract of land to this defendant for said sum and this defendant executed his bond to Gooch for \$1,350 to be paid when this defendant could effect a sale for said land."

The last sum stated as the consideration is \$450 less than that recited in the petition before referred to, and than that recited in the deed, and no reason assigned for reducing the price, no money claimed to have been paid, and why Gooch was willing to reduce his debt \$450, when appellant was bound to pay the full amount, is not attempted to be explained in the answer; and the smaller sum is only to be paid when a sale of the land can be effected, and that, may be assumed from the evidence of Cox, to a purchaser who is willing to take such title as he got from Cargile as the bond which he says he executed to Gooch is not produced, and nothing known of its contents except what is said of it in the answer. The price for the land as admitted in the last answer, and for which he says he gave his bond, if paid, is only about \$200 over one-third of the price that Cargile contracted to pay appellee for it, and the effort to prove that \$1,800 approximated a fair value wholly fails; the evidence very decidedly preponderates that the same was inadequate by other witnesses than Cox, and he proves that at the short time before the date of the deed to appellant, Cargile sold the one-half of the tract for \$20 per acre, making \$3,090 for

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one-half, and the sale was not consummated only because Cargile could not, or, rather, did not take the proper steps to make the purchaser a good title.

The transaction is not what it purports to be on the face of the deed, the evidence is far from satisfactory; indeed, there is no evidence, that Cargile owed Gooch anything, and it seems that Gooch and appellant are volunteers coming in, to aid Cargile to remove the land from the reach of appellee, and prevent him from collecting a just debt—and in that attitude the chancellor cannot favor appellant, but will have him to take under his deed what may be left after paying appellee his debt.

In this view of the case, it is not necessary to decide the effect of the alleged mistake in writing the deed. But it is proper to add that appellant is a *lis pendens* purchaser with actual notice of the existence of the suit and its objects, was appointed to carry out the judgment of the court, and by his own voluntary act attempting to defeat the very judgment he was ordered to execute. His attitude is such as to preclude him from presenting any obstacle in the way of appellee. Wherefore, the judgment is affirmed.

A. K. Bradley, Cissell & Vance & Gordon, for appellant.

Lindseys, Yeaman, for appellee.

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JAMES MCMILLAN v. TALTON TURPIN & WILLIS.

s and Conveyances—Restitution—Parties to Suit—Pro Forma Defendant not Barred.

In a suit by a plaintiff for specific performance and conveyance against the holder of the record title to land, the joining of a defendant pro forma who claimed an equity therein, does not bar him of a right to sue his co-defendant for a restitution, it being shown that the suit by plaintiff was for the absolute title to the land in controversy, the co-defendant being a mere holder in trust.

The co-operating with the plaintiff by such defendant for the purpose of settling who was entitled to the possession of the land, would not, by cross pleading or otherwise, be an assertion of a claim against the co-defendant for that equity which he would have no right to demand unless the plaintiff failed in enforcing the executory sale to him, and would not bar such equity, asserted in a separate suit.

APPEAL FROM MADISON CIRCUIT COURT.

June 5, 1868.

OPINION OF THE COURT BY JUDGE ROBERTSON:

In the case of McBane vs. Turpin &c. this court adjudged that Millan had paid \$275 of the consideration of \$300 which Turpin bound himself to pay to Baxter for the 20 acres of land, which he bought for McMillan and the residual \$25 having been paid to Turpin for McMillan's benefit. Turpin has been reimbursed the whole \$300. The land, therefore, which he sold to Willis for \$500 cost him nothing, but was paid for by McMillan under a verbal assurance that the land was bought for him and would be conveyed to him. Consequently it is evident that, as to the fraudulent conduct of Turpin in selling the land to Willis, the consideration of the payment of the \$300 by McMillan failed, and he is entitled to restitution.

We cannot concur with the circuit court in the opinion that McMillan's right to restitution is barred by the fact that he was a defendant to the suit of McBane vs. Turpin & Willis *for the title*, as he did not assert a claim to restitution in that suit. As vendor

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to McBane he was a proper party, so far as title was involved, and was therefore made a party *pro forma*. The only litigation in that case was concerning McBane's right to a decree for the legal title, and McMillan expecting that, if McBane should succeed in procuring the legal title, he would pay him the \$500 for which he had sold him his equity, and co-operating with McBane for that purpose only, did not, by cross pleading or otherwise, assert any claim against Turpin for what he would have no apparent right to demand, unless McBane failed in enforcing the executory sale to himself or should be required to pay Willis. Under these circumstances, McMillan's non-litigation of his contingent title to restitution which seemed to depend on Turpin's success in that case, should not bar his equity as now, for the first time, asserted and especially, as during the pendency of that case Willis, for Turpin, paid McMillan \$235 which seems to have lurked him into false and delusive confidence.

In his amended petition McMillan alleged that the said sum of \$235 was all that he had ever recovered. And that allegation was tacitly admitted. That payment left \$65 of the \$300 still due, with interest, from the time that McBane got the possession of the land. And to this extent we think that the appellant is entitled to relief.

Wherefore, the judgment dismissing his petition is reversed, and the cause remanded for such decree against Turpin as hereinbefore indicated.

(See opinion of McBane vs. Turpin, Vol. 1, Ky. Opinions, 142.)

Turner, for appellant.

Burnam, for appellee.

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JOHN B. CATES V. S. JOHNSON ET AL.

Contracts—Building Court House—County Judge as Contractor—Pleading—Answer.

While the official duties of the presiding Judge of the County Court require that he should participate actively in arranging for the erection of the public buildings of the county, appointment of necessary committees thereon, and to guard the interests of the people of the county in general and a proper sense of propriety should therefore restrain him from becoming a contractor for the erection of these public works, where his interests would conflict with his official duties, a successful bidding for and securing such a contract by him should be allowed to stand, where there is no statutory inhibition against a county judge, nor the pleadings show that he derived any advantage from his official position nor anything unfair in awarding the contract, nor a more advantageous one could have been made with others, and where the contract made was approved by the justices of the county court.

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Such failure to make the answer to the suit a good defense, was properly refused when offered to be filed in the court below.

APPEAL FROM LARUE CIRCUIT COURT.

January 24, 1868.

OPINION OF THE COURT BY JUDGE PETERS:

The only question presented by this appeal is the propriety of the ruling of the court below in refusing to permit the amended answer tendered by appellant to be filed, which necessarily involves the inquiry, whether the facts stated in the amended answer, constituted a defense to the action.

While the official duties of the presiding judge of the county court required that he should participate actively in arranging for the erection of the public buildings of the county, in the appointment of the necessary committee to have the work done in an economical manner, in the best style according to the means appropriated to the object, and to guard the interests of the people of the county, whom he in part represents, and a proper sense of propriety therefore should restrain him from becoming a contractor for the erection of these public works, where his interests would

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conflict with his official duties. Still as there is no statutory inhibition upon the county judge, and as it is not alleged that he derived any advantage in making the contract from his official position, nor that there was anything unfair in the contract, or that the county could have made a more advantageous contract with any other party, and as the same was approved by the justices of the county court, this court is not authorized to say that such contracts in no case should be allowed to stand. Furthermore it is not alleged in the amended answer that appellant did not get the full benefit of his contract with H. S. Johnson, but from what appears it must be assumed that he by virtue of that contract was authorized, and permitted to proceed with the work, and received the price agreed to be paid for the same by the county court. From what appears, therefore, in the answer, it is far from being manifested that the note sued on was without consideration; but from what is alleged and what is omitted to be alleged it must be taken that the note sued on was executed upon a valuable consideration. Wherefore, as the amended answer did not state facts which constitute a good defense to the action, there was no error in refusing to permit the same to be filed, and the judgment is therefore affirmed.

Murray, Cofer & Read, for appellant.

Johnson, for appellee.

FOUNTAIN RICE v. R. H. JOHNSON ET AL.

Husband and Wife—Separate Property—Chattels—Equitable Doctrine—
Fraud on Creditors.

The separate property of the wife would by law vest in the husband, yet if he does not so regard it, but recognizes it as belonging to the wife exclusively, such property would not vest in him, this however not to be made the instrument of defrauding creditors.

Same.

Shortly after marriage, the husband being unable to provide for himself and wife, his father-in-law furnished the wife with the necessities to start them to house keeping, in addition to presenting her with cows, a horse and negro servant. This was afterwards sold by the hus-

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band, the proceeds from which was paid toward the purchase of a house and lot. The balance of \$1500, was paid by the father-in-law with the understanding that the property was to be secured for his daughters use; but the deed was made to the husband. Held, that this would not effect the wives interest in so far as to subject the property to the individual debts of her husband, except as beyond her equity.

APPEAL FROM MADISON CIRCUIT COURT.

January 16, 1868.

RESPONSE BY JUDGE WILLIAMS:

(See original opinion, this volume.)

It would at all times be agreeable to this court to review the arguments and points made by counsel, if public duties and circumstances would permit, but these do not; such review and responses are physically impossible compatible with the discharge of our already onerous official labor, therefore, counsel should neither suppose that their points have not been duly considered nor slightly regarded, after considering the evidence and issues, the court writes its impressions, generally without reviewing or responding to either side, and a petition for a rehearing based upon the erroneous presumption that the facts and points have not been seriously considered only adds largely to our already vast labor.

In this case the appellant sought to subject the house and lot in controversy to the payment of his judgment debt, which he had unsuccessfully attempted to collect by execution. Caperton as trustee for Mrs. Johnson held the legal title, and the real question was as to its liability, for whatever claim and equity she had was fully known to appellant when he filed his petition, and not having enjoined Walker, the vendor, from conveying the legal title, the issue must be determined on the equities.

In the original petition it is charged that Johnson paid Walker, the original owner, \$500. This is denied in the answer and unsustained by proof. In an amended petition it is charged that Brady bought the lot by title bond from Walker at \$1,500, and that he sold to Johnson at \$2,000, and that Johnson paid him \$500. This is denied in an answer to it, and the written endorsement on the bond, signed by Brady and Johnson is referred to as containing the stipulations of their trade.

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The endorsement only shows that Johnson was to pay the accrued rent of \$150 for the year 1860, and was to pay the rent of the present year, and in all other things comply with Brady's undertaking with Walker, possession was to be given Johnson February, 1861. The written memorial of the contract between Walker and Brady is dated March 8, 1860, and stipulates that Walker sold to Brady the lot at \$1,500 to be paid January, 1864; and was to pay on January 1, 1861, \$150 as rents, and the sum annually until the principal was due.

In *Latimer vs. ———* 1 Bush, this court had occasion to very fully explore and review the equitable doctrine as to separate property in chattles, &c., which would by law vest in the husband, but which he all the time treated as her individual and separate property, and the authorities are very abundant to the point that although these would by law vest in the husband, yet if he does not regard them as his property, but recognizes them as his wife's, they do not vest in him, of course, however, this is not to be made the instrument of defrauding creditors.

In this case when Johnson and wife went to housekeeping, soon after the marriage, he having nothing, her father furnished her house with necessary furniture, gave her two milch cows, a horse, negro servants, &c., none of which was subject to his execution creditors, so far as appears in this record.

When they broke up housekeeping, previous to the purchase of this house and lot, he seems to have sold a part of this property, and hired out her servant, but this only appears in Judge Goodloe's deposition and from the same it is plainly inferable that Johnson recognized the money as hers, so whether he paid \$150 as he alleges, or none as Brady asserts, it was likely paid out of this means, for he had but recently purchased but a small stock of groceries, and that upon the credit of his brother-in-law, Barrett, as he seems to have had neither money nor credit. He could then very properly respond to his wife's importunity to purchase the house, that he was not able and could not spare the money out of his business, when she replied to use her money.

So poor was Johnson, that though his father-in-law aided much in his family's support, he failed to pay the annual rent, when Walker becoming impatient, was threatening to sue and did actually sue, and Mrs. Johnson applied to her father to pay for the house and lot for her; on inquiry he found about \$400 of rent was

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in arrears, besides the principal—\$1,500. He then told her this was more than the property was worth and he would not pay it, but preferred purchasing her a house and lot in Lexington.

Johnson, however, managed to pay the rent, and her father paid in the spring of 1864 to Walker, \$250, and September 20, 1865, \$1,370, making \$1,620, the principal and interest and probably accrued costs, to Walker, with the understanding that the title was to be secured for his daughter's use.

Walker had probably brought suit before this \$250 was paid, it had been understood that if her father paid the purchase price the property was to be for her use, he would hardly under the circumstances pay for it to be the property of his insolvent and improvident son-in-law.

Her father had doubtless determined to pay for this property and secure it to her when he made the first payment in the spring of 1864, he fixed the period in 1863, but he is probably mistaken as to a year. No witness says it had then largely enhanced in value, nor indeed do we infer the enhancement was of much significance until the surrender of the rebellion in 1865. If it had really so enhanced, why did appellant remain so quiescent with his judgment and return of *nulla bona*? He could have secured his debt and obtained a *lis pendens* unencumbered with Mrs. Johnson's equity up to the payment of the purchase price by her father. His conduct is anomalous and unaccountable, but he seemed to have been aroused with a fierce zeal so soon as he was informed of this payment, for which he seems to have been watching with anxious care. As to the small sums laid out for improvements by Johnson, the opinion is sufficiently explicit.

On the whole we conclude that neither law nor justice requires that she shall be disturbed in her beneficial right to this property, hence overrule the petition for a rehearing.

Turner, for appellant.

Burnam, for appellees.

EDWARD KENDALL v. HORACE S. GAAR.**Evidence—Proof of Interested Witness Being Signer of Attachment Bond Coincident of Names—Witness.**

The mere coincidence of names will not authorize the conclusion that they represent the same person. Proof must be had, that a witness whose testimony was used in the court below, was the same person as the one whose name appeared to the attachment bond, in order to exclude him as a witness, on the ground of being an interested party to the suit.

APPEAL FROM JEFFERSON CIRCUIT COURT, CHANCERY DIVISION.

February 6, 1868.

RESPONSE OVERRULING THE PETITION FOR REHEARING, BY JUDGE HARDIN.

As the petition for a rehearing, is based mainly on the assumption of the fact, that this court in its conclusion as to the interest of N. H. Gaar in this cause, labored under some misapprehension of the facts disclosed in the record, we deem it proper, by way of response to the suggestions so earnestly urged by the counsel for the appellant, to state the reasons upon which we have decided that the exceptions to said N. H. Gaar's deposition was properly overruled. But a single ground of exception is assigned—"the manifest interest of said Gaar in the subject matter of this suit—said N. H. Gaar being jointly bound to defendant for 1-3 of the profits and losses of the cultivation of said Page farm." The point of objection is thus specifically defined to be the supposed interest of the witness, as one of the original lessees of the farm. And to this the opinion already delivered sufficiently responds. But the counsel now urges a different cause of objection to the competency of the witness; and one not only not specified in the exception filed but constructively excluded by it, viz: that the witness was H. S. Gaar's surety in the attachment bond; and we are now asked to decide the question whether a surety for a party in an attachment bond is a competent witness for such party in the same action. Certainly we do not decide that a person thus liable as surety is competent to testify as a witness in the same

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ses for his principal. But it is not only incorrectly assumed the counsel, that the deposition of Gaar was excepted to on this und, but that there is any sufficient evidence that said witness the same N. H. Gaar whose name is signed to the attachment d in this case. His deposition shows him to be the brother of S. Gaar and the same person who was a party to the lease, but proves nothing, and was asked nothing on his cross-examination identify him as the same N. J. Gaar who signed the attachment d, nor is there any evidence so identifying him in the record. herefore the question of interest growing out of the liability on attachment bond could, under any circumstances, be made ilable, when raised for the first time in this court, it could not sustained for the reason that it is not shown that the witness e surety in the bond. The mere coincidence of names will not orize the conclusion that they represent one and the same on, as several persons in the same community often have the e name.

Upon a careful consideration of the suggestions of the petition a review of the grounds of the opinion delivered in this case, have failed to perceive any sufficient reason for adopting a erent conclusion. The petition is therefore overruled.

Fix, for appellant.

Aldwell, for appellee.

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J. D. OSBORNE v. R. K. WHITE & SELVAGE.**Street Improvement—Property Holders Expense—Each Front Liable.**

Property fronting on more than one street, shall be taxed for such street improvements as made thereon, but only each front is liable for the improvements made on it, and not on the other fronts. And the purchase of a long front, however narrow may be the lot, the purchaser must be presumed to have known the burdens thus placed upon it, and find compensation for these in the reduction of the consideration to be paid, or the prospective increase in value.

Same—Confiscation, Under Guise of Taxation.

Particular circumstances might arise however which would forbid the holding of a long narrow front liable for improvements made on it, in that it might amount to the confiscation of the property, under the guise of taxation.

APPEAL FROM LOUISVILLE CHANCERY COURT.

February 13, 1868.

OPINION OF THE COURT BY JUDGE WILLIAMS:

The city charter and amendments authorized the city council of Louisville, to have the streets improved at the expense of the property holders, and of course the property holder became personally liable for such an outlay, whatever may have been the measure of his responsibility, it was a personal obligation, secured also by a lien upon the property, the front of which might be so improved.

The evidence does not authorize the conclusion that the city council transcended its legal authority in the improvement in this case, nor in the assessment of the expense thereon. Only corner lots can have three fronts, and as these have the benefit of three streets and which greatly enhances their value, we do not see why the front on each street shall not be taxed for the improvement of the street in its front, but only each front is liable for improvement made on it, and not on the other fronts, and if a man should see proper to purchase a long front, however narrow may be his lot, he must be presumed to purchase with a view to the burdens which by law may be imposed on it, and find compensation for

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these in the reduction of the consideration to be paid, or in the prospective increase in value. Whilst we do not intend to decide that there might not be peculiar circumstances which would forbid the holding of a long narrow front liable for the improvements made thereon, as this might amount to a confiscation of the property of the owner, under the guise of taxation, yet we do decide that this case presents no such peculiar facts. This purchase was probably made by Osborne in full view that the council had determined to improve the street, and though his lot fronts Eighth street 269 feet and is only 35 feet deep, still it would be liable to the expense of improving this front even if Osborne knew nothing of the council's determination to improve Eighth street, or if indeed the council had not then determined to have the street improved.

Judgment affirmed.

Thompson, for appellant.

White, Boone, for appellees.

THOMAS SEBREE'S DEVISEES v. WESLEY SEBREE ET AL.

Wills—Devise—Construction—Power to Sell and Convert into Money—Bona Fide use for Life—Trust for Benefit of Devisees—Resulting Trust.

A testator by will, after he had bequeathed to his wife during life or widowhood all his estate after payment of his debts, provides a clause as follows, "with full power to sell any land or anything else—that she thinks proper, to make or receive deeds for lands or anything she may sell or buy x x x and at her death, or at any other time she may think proper to give up the whole or part of the property, it is to be equally divided between my sons Wesley and Lovell Sebree and my daughters, Polly Stout, Betsey Smith, Jane and Emmie Sebree, etc." Held, that while this would give, the wife the power to sell and convert the land into money for her own bona fide use during life, there is a trust for the benefit of the devisees, to be shared equally at her death or sooner should she surrender same. She would have no power to prefer one of the legatees to the others, or give either one an advantage at the others expense: to do so being a violation of the trust, and contrary to the testators intentions.

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June 11, 1868.

OPINION OF THE COURT BY JUDGE WILLIAMS:

Thomas Sebree died soon after publishing his will of August 1, 1839, in which he devised and bequeathed to his wife during life or widowhood all his estate after the payment of his debts.

"with full power to sell any land, negroes or any thing else that she thinks proper, to make deeds or receive deeds for lands or any thing that she may sell or buy, x x x and at her death or at any other time that she may think proper to give up the whole or part of the property it is to be equally divided between my sons Wesley and Lovel Sebree and my daughters Polly Stout, Betsey Smith, Jane and Emmie Sebree," &c.

Wesley Sebree lived on an adjoining farm and continued to superintend and control the farm of 50 acres, which his father left and the business affairs generally of his mother, who was then far advanced in life and of impaired constitution and delicate health.

Mrs. Sebree was appointed executrix without the necessity of bond and security. She entered upon the execution of the will, but never returned to court an inventory of the assets, nor made a county court settlement.

February 19, 1855, she acknowledged, before the county clerk, a deed of general warranty dated four days previously, conveying the fifty acres of land to her son Wesley for the recited consideration of fifteen hundred dollars, paid. And on the same day she acknowledged for record a mortgage on a negro woman Rachel to her said son to secure \$450, being the purchase price of \$245, with interest thereon from December 30, 1841, which he had paid as her security, which mortgage is dated January 15, 1855.

She also under date of January 1, 1855, made a written acknowledgement that the money paid J. F. Robinson for Rachel of \$245 as per his receipt to Wesley Sebree, of December 30, 1841, was paid as her security and she promised to pay him \$450 with interest from date.

There is also exhibited by Wesley Sebree a note, with the signature torn off, for \$700 at six months, payable to Jeremiah Messer, dated February 11, 1839, attested by Garland Smith and

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et O. Stout, which had been assigned to Abram Minor, on which is a written acknowledgement signed by Elizabeth Sebree, without date, attested by F. J. Dehoney, acknowledging that it was the note of Thomas Sebree and was paid by Wesley Sebree for instance and she would pay it to him with interest from August 11, 1839.

Mrs. Sebree died in the year 1863, and in October, 1865, the plaintiffs filed their petition, charging fraud, overreaching, undue influence by Wesley Sebree in obtaining said deed over his aged, blind and incapable mother; also that it was without consideration and call on him to specify when and how he paid the recited consideration. To this he responded that he paid the consideration by taking up the debt of his father for \$700 to Alvin Messer for paying for the negro woman Rachel, bought for his mother, and some small amounts in money which there lacked of being the amount specified in the deed, as the consideration; he denied all fraud, &c., or that his mother was incapable of transacting her business, and traversed the general allegations of the petition.

S. Dehoney and James McCord were the subscribing witnesses to the deed, but only the evidence of McCord was taken, and he proves that he was sent for the night the deed was made, to witness it, and count the money, and that the full amount called for in the deed was counted by him, and then paid over by Wesley Sebree to his mother.

What became of this money afterwards we are not informed, the evidence shows that she was an industrious, economical, prudent woman, with a small family, consisting of not over three or four persons after her husband's death, and though she had small amounts of money to loan out, these do not indicate anything like the amount specified in the deed.

It is quite probable also from the evidence that she realized a great deal of over a thousand dollars held by her husband on Cal Johnson and with some other resources of stock, &c., the Messer debt on the purchase of Rachel was most probably paid with her own money.

Besides, it is hardly probable that Wesley would have paid large sums for her and let them rest in parol, without any witnesses, or written evidence, for near fifteen years, and even when the deed was executed, instead of reciting these as the consideration, he recited the money, and then at the same time take a mortgage to

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secure the money paid for Rachel. There can be no perceivable *bona fide* reason for paying the \$500 for the land in money and then taking a mortgage on the negro woman for \$450.

But if the design was to get into his hands both the land and negro, and at the same time let his mother have their use for her life, the deed for the land and mortgage on the negro were the appropriate means, as to permit the negro to remain with her would vitiate an unconditional sale.

The various transactions together with his incorrect statement as to how and when the consideration was paid, strongly impresses the judicial mind that it was not a *bona fide* fair sale and conveyance, upon an actual valuable consideration, but a contrivance by which Wesley was to become possessed at his mother's death, with the land and negro to the exclusion of the other devisees.

Whilst the will gave to her the power to sell and convert the land into money for her own *bona fide* use during life, yet there is connected with it a trust for the benefit of the devisees, for they are jointly to share it equally at her death, or sooner, if she should see proper to surrender it, and the effort of Wesley to oust his co-devisees by getting these conveyances was contrary to the testator's intention and could only be effected by a violation of the trust on the part of his mother. Whilst for her own actual use and necessity she had unlimited control over the property, she had no power to prefer one of the legatees to another, or give him an advantage at the expense of the others, and any effort to do so, no matter by what subterfuge, was a violation of the trust reposed in her, and cannot prevail against the manifest intention of the testator.

Wherefore, the judgment is reversed with directions to the court below to set aside said conveyance and partition the property according to testator's will.

Darnaby, for appellants.

Robinson, for appellees.

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HENRY DELANEY v. JOHN LEE.

Evidence—Competency—Objections to Opinion of Witness.

A question to a witness whether in his "opinion from his occupation as a farmer, habits of observing stock, and opportunity as a neighbor of the appellant, if the mule in controversy had been at the farm and in possession of appellant as early as October or November, 1862, he would not have known it, before August, 1863, the first time he saw it" is held not to be incompetent and illegal, the particular mode of interrogation not being erroneous. To have changed the form would have but resulted in producing the same reply, and it would be hypertechnical to reverse on such objections.

Appeal and Error—New Trial—Requirements in Motion for.

The provisions in Sec. 372 Civ. Code. as to applications for a new trial by motion etc., requires, all errors, which the party complaining, deems to have been committed prejudicial to him in the progress of the trial, must be presented in writing as grounds for a new trial, in order to direct the attention of the Appellate Court to the alleged errors, for correction. The mere objection to the introduction of testimony during the trial, is not sufficient.

APPEAL FROM UNION CIRCUIT COURT.

May 23, 1868.

OPINION OF THE COURT BY JUDGE PETERS:

The evidence is conflicting and if it can be said to preponderate in favor of appellant, the preponderance is not so great certainly as to authorize this court to interfere, and award a new trial on that ground after a motion therefor had been overruled by the circuit court.

Nor can we decide that the judgment was against the law; only one instruction was given to the jury, which was acquiesced in by both parties, as no exception was taken to it, and it properly presented the legal proposition involved in the issue.

But it is insisted that the court below erred to the prejudice of appellant in admitting incompetent and illegal evidence to go to the jury, notwithstanding his objections. The evidence complained of is an affirmative answer to a question propounded to the witness Gilchrist by appellee, in substance as follows: Whether

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in his opinion from his occupation as a farmer, habits of observing stock, and opportunity as a neighbor of appellant, if the mule in controversy had been at the farm and in possession of appellant as early as October, or November, 1862, he would not have known it, before August, 1863, the time he first saw it.

The objection is rather to the mode of interrogation, than to the answer; if the witness had been asked directly whether he would not have known the fact, if the mule had been in possession of appellant as early as October, or November, 1862, from the opportunities he had of being informed on the subject, etc. Omitting the words in the question ("In your opinion") and the witness had answered *Yes in my opinion I would, or I believe I would*, in that presentation of the question, and answer there is no doubt that the question would have been unobjectionable, and the evidence competent; and this is the substance and effect of the evidence scrutinized, and understood, and it would be hypertechnical to reverse a judgment on such grounds.

But furthermore, section 372 *Civ. C.* provides that the application for a new trial must be made by motion upon written grounds, filed at the time of making the motion, &c.

This *section* as we understand it, requires all the errors which the party complaining deems to have been committed prejudicial to him in the progress of the trial, must be presented in writing as grounds for a new trial, in order to direct the attention of the court to the alleged errors, so as to have them corrected there, if the court should become convinced upon further reflection that errors had been committed, from which it would seem that unless the alleged errors were thus presented as ground for a new trial, they should be regarded as waived. But whether that be the proper interpretation of the section of the Code referred to we need not here decide, since there seems to be no error in the ruling of the court complained of. Wherefore, the judgment is affirmed.

Hughes, for appellant.

Rodman, Geiger, for appellee.

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J. L. BOTTOM ET AL V. ELGY CHANDLER.

—Gift of—Future Recognition—Dower.

The father bought a tract of land and directed the vendor to convey it to his daughter. A few hours before the father's death he called on the grantor to remember his promise to the daughter. No deed or writing having been made between the parties. Held, that a direction to convey to the daughter and future recognition of the gift by her father, must be regarded as a gift of either the money or land to her. The title never being in the father, either equitable or legal. the widow is not entitled to dower.

APPEAL FROM ADAIR CIRCUIT COURT.

October 9, 1868.

OPINION OF THE COURT BY JUDGE WILLIAMS:

In the winter of 1844-45 McWherter in exchange sold John Monday deceased a tract of 62 acres of land for \$302 paid and to be paid.

Monday directed him to convey it to his daughter Nancy, then eight years old, who is now the wife of J. T. Bottom.

But a few hours before his decease Monday called on McWherter as he testifies "*to remember my promise to his child;*" no deed or other writing seems to have been executed by McWherter, but says he will convey when the remaining \$12 is paid.

Although Monday and his family seem to have resided on the land as well as Bottom and his family, yet the widow never claimed her interest in it, and as the direction to convey to Nancy and future recognition of the gift by her father must be regarded as a gift of either the money or land to her, the title never being in the father, either equitable or legal, the widow is not entitled dower.

It was therefore erroneous to adjudge dower to her and subject her to payment of her debts created since her husband's death. Judgment reversed, with directions to dismiss appellee's petition.

Arnett, Caldwell, for appellant.

R. Robinson, for appellee.

STANLEY C. YOUNG'S ADMR. v. I. W. OVERTON ET AL.

Cross-Petition—Pleadings—Demurrer.

Where a defendant has a cause of action against a co-defendant, or a person not a party to the action, and affecting the subject matter of the action, he may make his answer a cross-petition against a co-defendant, or such other person, and such cross-petition is not demurrable.

APPEAL FROM MEADE CIRCUIT COURT.

October 13, 1868.

OPINION OF THE COURT BY JUDGE PETERS:

That the money paid by Moreman for the cattle was applied as a payment on the execution in the name of Pollock and Timberlake against appellee Overton, is established by the preponderance of the evidence, and we concur with the court below in perpetuating the injunction to that extent.

But it was erroneous to sustain the demurrer to the cross-petition of Young. It was filed after the act of the 16th of December, 1857, took effect, which is an amendment to the 125th section of the Civil Code, and which provides that where a defendant has a cause of action against a co-defendant, or a person not a party to the action, and affecting the subject matter of the action, he may make his answer a cross petition against the co-defendant, or other person. Meyers' Code of Practice, 39.

Appellant was entitled to have his debt, if the defendants in the execution had paid the amount thereof, or any part to the sheriff or his deputy having the same in his hands, he had his remedy against them, the execution had not been returned as required by law, and when the petition was filed by Overton to enjoin the collection of the money sought by the subsequent execution, on the ground that he had paid the money to Robertson, the deputy sheriff, and made him a defendant with the plaintiffs in the execution; these allegations were sufficient to show that Young representing the assignee of the plaintiff in the execution, had a cause of action against his co-defendant Robertson, and Gough, the latter being the sheriff at the time, growing out of, and affecting

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subject matter of that action, and consequently he could maintain his cross-action against said parties for the recovery of the amount of money collected by virtue of said execution. This was recommended itself, because it was the most direct way to settle the controversy, and put an end to further litigation. The proper order, therefore, to Young's cross petition was improperly refused.

Therefore, the judgment perpetuating the injunction of Overton for \$121.12-100 is affirmed, and the judgment is affirmed on Young's cross appeal, and the costs of the one will be set off against those of the other. But the judgment sustaining the decree to Young's cross-petition against Gough, Robertson, &c., is reversed, and the cause remanded with directions to overrule said decree, and for further proceedings consistent herewith.

Wendsey, for appellant.

Walker, Rodman, for appellees.

N. E. MITCHESON v. J. WEIR, TRUSTEE.

Sold on Installments—Interest Reserved in Note not Usury.

The reservation of ten per cent interest, for one year, in a note for the purchase price of land, in the event of non-payment when due, was part of the consideration and not usury.

APPEAL FROM DAVIES CIRCUIT COURT.

October 7. 1868.

OPINION OF THE COURT BY JUDGE ROBERTSON:

The recital of the consideration in the conveyance of the title justified the note now sued on as for the last installment of the consideration, and the note itself shows the same fact.

Consequently these filed documents alone, without any averment, that the provisions of the note constituted stipulations in the contract of sale of the land, and of course prove that the reservation of ten per cent interest for one year in the event of non-

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payment when due, and of an election by the obligor to postpone payment for a year, was a part of the consideration of the sale of the land, and not an usurious exaction for forbearance for money loaned.

The circuit court having so adjudged, and there being no other objection to the judgment as rendered than that it overruled the claim of alleged usury, the judgment is affirmed.

Ray & Hardin, for appellant.

Weir, for appellee.

RICHARD P. BRUDING v. J. W. GLEASON ET AL.**Confiscation Laws—Forfeiture of Property—Impressment—Illegal order of Superior.**

The right of impressment is justified only by emergencies and a citizen's property cannot be taken without proof of forfeiture. When no justification is made out, subordinate officers are responsible for executing illegal orders of their superiors, and are trespassers.

APPEAL FROM ADAIR CIRCUIT COURT.

October 7, 1868.

OPINION OF THE COURT BY JUDGE WILLIAMS:

Had it been proved that appellant had by his own acts forfeited his rights of property under the confiscation laws of Congress, still this would not authorize the military authorities by any kind of irregular proceedings to seize it and adjudicate the questions themselves, but to take the property of the citizen under such a pretext without any proof establishing the acts of forfeiture, is wholly disallowable. The right of impressment is confined within narrow limits, being justified only by emergencies; so whether the taking in this instance be predicated on acts of forfeiture or the right of impressment, no justification is made out and those subordinat

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ers, executing an illegal order of a superior, even had this been
n, would still be trespassers.
e instructions were erroneous, and the judgment is therefore
sed.

arnett & Baker, for appellant.

amlette, for appellee.

C. LEDWIDGE V. R. H. SHORT ET AL.

ges—Value—Amount—Taken as True—Law and Facts Submitted to
the Court.

The "Law and Facts having been submitted to the court without the
intervention of a jury, and the court being advised etc, adjudged etc."
held, that the foregoing recital very clearly implies that a trial by a
jury was waived and the facts as well as the law submitted to the
court. Therefore, it will be presumed that every fact was proven neces-
sary to authorize the judgment.

n for a New Trial—Reasons Therefore.

A motion for a new trial was made within the time prescribed, by
law but no reasons therefore were filed; Held, that merely handing the
grounds for a new trial to the clerk is not sufficient; an order must be
made showing they were filed under the authority of the court.

APPEAL FROM FULTON CIRCUIT COURT.

October 15, 1868.

OPINION OF THE COURT BY JUDGE PETERS:

is insisted first, that under *Sec. 153 of Civ. Code* mere allega-
of value, or amount of damages shall not be taken as true if
answered, and must be proved. The judgment recites in this
that the "law, and facts arising herein being submitted to the
t without the intervention of a jury, and the court being
sed, &c., adjudged, &c." The foregoing recital very clearly
ies that a trial by a jury was waived by the agreement of par-
and the facts as well as the law submitted to the court, as
had a right to do under *Sec. 361 Civ. C.* and as the issues of

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fact were submitted, we must presume in the absence of any of exceptions, that every fact was proved necessary to authorize the judgment, including the amount of damages sustained.

A motion for a new trial may have been made within the time prescribed, but no reasons therefor were filed, merely handing them to the clerk was not sufficient. The court must be notified, and an order made showing they were filed under the authority of the court, which is not done.

This court cannot decide that the amended answer was properly rejected; it is not before us, no bill of exceptions was taken, incorporating the amendment offered, so as to identify the rejected paper, and the mere statement of the clerk is insufficient as has often been held by this court.

No errors are perceived available for a reversal, and the judgment must be *affirmed*.

James, for appellant.

Rodman, for appellee.

HARVEY MCGINNIS v. ELI HOWARD.**New Trial—Verdict not Sustained by Evidence.**

The evidence must be palpably against the verdict to authorize reversal on the ground that the verdict is against the weight of the evidence.

New Trial—Newly Discovered Evidence.

Newly discovered evidence, disclosed after a trial, relating to matters which were contested on the trial and as to which several witnesses were examined, held, not sufficient to authorize a new trial.

APPEAL FROM GREENUP CIRCUIT COURT.

October 7, 1868.

OPINION OF THE COURT BY JUDGE HARDIN:

Whether or not the court below erred in refusing to grant the appellant a new trial either on the ground that the verdict of

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jury was not sustained by the evidence, or for the discovery of evidence after the trial, is the only question in this case.

The evidence as to the identity of the mare in controversy is singularly conflicting and such as it was, it was the peculiar province of the jury to weigh. In such cases this court has repeatedly held, that the evidence must be palpably against the verdict to authorize a reversal on the ground that the verdict was against the weight of evidence. There is not, in our opinion, such a preponderance of the evidence against the verdict in this case. And as the newly discovered evidence disclosed after the trial, related to matters which were contested on the trial, and as to which several witnesses were examined, the court rightly refused on that ground to set aside the verdict.

Wherefore, the judgment is affirmed.

Ireland, for appellant.

Wadsworth, for appellee.

WILLIAM T. DUDLEY v. JOHN W. JEFFRIES ET AL.

WILLIAM T. DUDLEY v. W. K. WALL'S HEIRS ET AL.

Decretal Sale—Resale—Vested Rights.

Where real estate has been regularly and fairly sold at a fair price, the first bidder, having no vested rights before confirmation, cannot complain at a second sale, at which another bids more than he is willing to give.

APPEAL FROM FLEMING CIRCUIT COURT.

October 16, 1868.

OPINION OF THE COURT BY JUDGE ROBERTSON:

Whatever we may think of the propriety of a chancellor's opening bidding when, under his decree, real estate has been regularly and fairly sold at a fair price, the first bidder, having no vested right before confirmation, has no just cause of complaint when, at

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the second sale, another person bid much more than he was willing to give.

And, under such circumstances, this court cannot reverse the order opening the bidding, but must adjudge that the last sale was properly confirmable.

Wherefore, the judgments are approved.

Wadsworth, for appellant.

Stanton & Throop, for appellees.

R. J. PATTERSON v. S. G. HUTCHISON ET AL.

Husband and Wife—Wife's Separate Estate for Life—Remainder to Children Held in Trust—Mortgage with Consent of donor.

The husband bought and paid for land and had the legal title conveyed to himself in trust for the separate use of his wife and of his children during life and after her death the remainder for said children. Held, that the husband was not only trustee but donor of the trust, and had a legal right in conjunction with his wife to sell or mortgage his interest for her support.

APPEAL FROM MEADE CIRCUIT COURT.

October 14, 1868.

OPINION OF THE COURT BY JUDGE ROBERTSON:

In this case the husband bought and paid for the land and had the legal title conveyed to himself in trust for the separate and exclusive use of his wife and of the children of her body during her life and after her death, the remainder for said children.

Constructively, the right of the children was a remainder only. The separate use during their mother's life (meaning separate from her husband) could not reasonably apply to them, and if it could it would have been incongruous and absurd to give to them a fee simple estate for life, and then add to it the remainder in fee simple. Consequently, the mother was entitled to hold the whole usufruct during her life.

And, under the authority of the 17th section of Ch. 47, Art. 4

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Statutes, and of the Amendatory act of 1866, Myers' Suppt. 28, the husband who was not only trustee but substantial donor of the trust, had legal authority in conjunction with the wife to execute a mortgage for her support her interest. To that extent there-fore, the mortgagee in this case has a right to a sale for the payment of his mortgage debt.

But the circuit court construing her interest as only one-sixth of her life estate, jointly with her five children, limited the sale to one-sixth.

This we adjudge erroneous.

Wherefore, the judgment is reversed, and the cause remanded with a decree subjecting to sale the entire life estate.

Fincheloe & Lewis, Walker, for appellant.

Hofer, for appellees.

GEORGE W. CHISM v. ELIZABETH CHISM.

Exemption—Widow without Children—Failure to Demand—Administrators' Duty.

A widow, who has no children left by her deceased husband, is entitled to her exemption and the fact that she failed to demand said exemption when the appraisement was made, did not release the administrator from his responsibility incurred by taking and selling the property, it being his duty to cause the exempt articles to be set apart to her.

APPEAL FROM MEADE CIRCUIT COURT.

October 13. 1868.

OPINION OF THE COURT BY JUDGE HARDIN:

If the appellee was entitled to any recovery in this case a careful examination of the record has satisfied us that the sum adjudged to her was not too large.

But the main question to be determined is, whether, as the appellee's late husband, Richard Chism, left no infant children residing with her, she was entitled to the benefit of the provisions of the subdivision of section 11 of chapter 30 of the Revised Statutes,

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which declares, that "If an intestate leaves a widow the following property, (one work-beast, &c., &c.) shall be set apart by the appraisers of the estate and vest in such widow for the use and benefit of herself and the infant children of the intestate, if any residing in the family."

In the case of *Newman vs. Winlock's Admr.* involving the construction of the above provision of the statute, it was held by this court, at its last term, that the widow was entitled to have the exempted property set apart to her, including provisions for herself although her husband left no infant children residing with her. She being only chargeable with the exempted property under a succeeding part of the same section, if there were children of the intestate who did not reside with her.

The fact that the appellee failed to demand when the appraisement was made, that the exempted property should be set apart to her, did not release the administrator from his responsibility incurred by taking and selling the property. It was his duty to cause the exempted articles to be set apart for the appellee, as directed by the statute.

It appears that the appellee retained two beds and some other property which was exempt from sale for which she was not required to account, as property purchased or taken at its appraised value, but the report of the commissioner, as corrected by the court does not charge the appellant with these articles.

He seems only to have been charged with the exempted property for which the appellee accounted to him as purchased and taken under the appraisement, and which was improperly sold to others, amounting to \$191.42 and from that sum was deducted \$38, the excess of what she received and purchased, over what she actually paid for, leaving a balance which with interest, computed to the date of the judgment, amounted at least to \$195.36, the sum adjudged to the appellee.

Wherefore, no error being perceived in the judgment to the appellants prejudice, the same is affirmed.

Walker, for appellant.

Wintersmith, for appellee.

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CHARLES H. WHITE & HILL v. E. S. FLETCHER ET AL.

Voluntary Conveyances—Subsequent Debt.

A voluntary conveyance, without consideration, cannot be avoided on that account alone, by creditors whose debt occurred subsequent to the execution of the deed.

Same—Balance of Purchase Price, Unpaid, Subject to Debts.

The residue of the unpaid purchase price due under a voluntary conveyance is subject to execution by creditors, whose debts accrued subsequent thereto.

Recitals in Deed not Evidence Against Stranger—Good Between Parties.

The recitals in a deed are not evidence against a stranger, although they are as between the parties to the instrument.

Deeds—True Consideration—Burden of Proof.

The burden of proof is on the parties to a voluntary conveyance, to show that a stated consideration, admitted by them to be erroneous, is not valid and nothing is owing thereon.

APPEAL FROM BOYD CIRCUIT COURT.

September 22, 1868.

OPINION OF THE COURT BY JUDGE PETERS:

The recited consideration in the deed from Fletcher to Wood, is Three Thousand dollars, acknowledged to have been paid down, but they both admit in their answers that all the purchase price was not paid, and allege that the true consideration for the conveyance was Two, and not Three Thousand dollars, and of that only \$1,251.90, the amount of Fletcher's indebtedness to Wood. were paid down.

If the conveyance had been volutary, and without consideration, appellants could not *on that account alone have avoided* the deed, because their debts were contracted subsequent to its execution, but as the parties to it admit, that it was made for a valuable consideration, and the deed recites the consideration, the creditors of Fletcher may reach whatever of the price remains unpaid, and appropriate it to the satisfaction of their debts.

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The true character of the transaction is not stated in the deed as is admitted; instead of the whole of the purchase money having been paid down at the time, only a part was paid, and instead of the price being \$3,000, they say it was only two, and they take no proof to show that anything was owing by Fletcher to Wood, not even a note is alleged to have been taken, none exhibited for the residue of the alleged price, after deducting what they say Fletcher owed Wood at the time.

If the price expressed in the deed, was not the true price to be paid for the land, Wood & Fletcher should have proved it, and they should have proved that the Two Thousand dollars were paid; they held the affirmative of both these issues which they make themselves, and the *onus* was on them. The recitals in the deed, as has been too often held by this court to require citations of authority, are not evidence against a Stranger, although they are as between the parties, nor can the answer of one defendant be read or taken as evidence for his co-defendant. As then Wood failed to prove the purchase money was paid, it was a fund which Fletcher's creditors whether prior, or subsequent could reach and apply to the satisfaction of their debts, in his hands.

Wherefore, the judgment is *reversed*, and the cause remanded with directions to render judgment in favor of appellants for their debts, and to subject the house and lot in the pleadings described to the payment thereof, postponing Wood's claim, and for further proceedings consistent herewith.

Affirmed on cross-appeal.

Ireland, for appellant.

Dulin, for appellee.

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TAYLOR CRANE v. RILL COX.

Judgment—Rendered at same Term of Confession—Motion to Set Aside.

If a final judgment be rendered at the same term upon a confession on motion, the court should set it aside, and a refusal to do so is reversible error; but not erroneous on a non order of confession when the final judgment was not rendered until the succeeding term, and when no defense was presented.

Misprisions—Judgment and Final Orders Corrected.

Sec. 579 Civ. Code, which authorizes the court, at a subsequent term, to correct its misprision, applies to judgments or final orders.

APPEAL FROM JEFFERSON CIRCUIT COURT. C. P.

September 18, 1868.

OPINION OF THE COURT BY JUDGE WILLIAMS:

Although the order of confession was premature, the process not having been executed ten days before the commencement of that term, and should have been set aside on mere motion, which was made at the same term of the court, though more than three days had elapsed, yet as no final judgment was rendered until the succeeding term in May when defendant again moved to be permitted to file an answer which was overruled, we cannot say that the record presents any reversible error.

No answer seems to have been permitted, at least none appears on the record, hence, neither the court below nor this court could or can determine that the defendant had any real substantial defense, and, therefore, we cannot determine that any substantial injustice has been done the defendant, especially as there was an enquiry and jury to assess the damages, sworn immediately after the overruling his motion.

Had the confession at the previous term been set aside and no legal defense presented it would have resulted in another order of confession, without answer, hence, the most that can be said is that the premature order of confession was merely technically erroneous. The final judgment was not prematurely rendered, for stood for trial at that term under any of the special acts ap-

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plicable to the Jefferson Court of Common Pleas, process having been served over 15 days and also over 20 days before the term.

Had the final judgment been rendered at the same term of the confession, as it would have been premature, the court should have set it aside, and on refusal this court would have reversed, but not so on a non order of confession, when the final judgment was not rendered until the succeeding term and when no defense was then presented.

Sec. 579, Civ. Code, which authorizes the court at a subsequent term to correct its misprision, applies to "*judgments or final orders*" and section 580 designates the mode of proceeding to get the correction that is on "motion upon reasonable notice"; had notice and motion thereon regularly appeared, still unless answer and defense had been presented, no substantial benefit to the defendant would have been gained, as another order of confession would have been immediately entered.

Had a substantial defense appeared in this record, the whole aspect of the case would have been different.

Wherefore, the judgment is affirmed with damages.

Bullitt, for appellant.

Bullock & Anderson, for appellee.

LUCY PENDLETON'S ADMR. v. JAMES L. LAWSON ET AL.

Ante-Nuptial Contract.

The written consent of the husband to the use of the wife's property, made at the date of marriage, and attached to and recorded with the wife's will, held to be an ante-nuptial contract.

Contract Between Husband and Wife—Use of Wife's Property—Express Contract.

Under a written agreement between husband and wife, that she retained the right to hire out her personal property or keep same as she may think proper, should she decide to keep same for the family use, the law will imply no contract on the part of the husband to pay hire during their joint lives.

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—Use of Property by Husband After Wife's death.

The retention and use of the personal property of the wife, by the husband, after her death, will imply a promise to make a reasonable compensation therefor.

APPEAL FROM TODD CIRCUIT COURT.

December 4, 1868.

OPINION OF THE COURT BY JUDGE WILLIAMS:

The written consent of John Pendleton, dated October 3, 1844, attached to Lucy Miller's will, both of which were made in contemplation of their intended marriage, were properly regarded by this court as an ante-nuptial contract, these being put to record on their date.

By this writing she retained the right "*to hire out her negroes as she may think proper*"; if she chose to keep them for her own or the families use, it was as much the exercise of legitimate power as to hire them out, but if she chose to re-let them for such purpose, the law would imply no contract on the part of the husband to pay hire during their joint lives, his responsibility therefor could only be fixed by an express contract, which is not even set up by the plaintiff, nor established by the evidence. But as the husband retained said slaves after the wife's death, and when they became the property of her estate and heirs the law would imply a promise to make reasonable compensation therefor; therefore, his estate should be held responsible for all reasonable hire not barred by lapse of time, and as to this, the argument is erroneous and is therefore reversed with directions for further proceedings consistent herewith.

Kennedy, Lindsey, Bullock and Davis, for appellant.

Melend & Evans, Petrie, for appellees.

MILTON WITTY v. THE TOWN OF EDMONTON.

Pleadings—Defective Petition—Suit to Enforce Payment for License a Coffee House Keeper—Liquors.

In a suit to enforce payment for a license to sell liquor, the allegations in the petition must show that the town trustees had the lawful authority to require of defendant the sum alleged owing for the license and the defendant had promised to pay therefor.

APPEAL FROM METCALFE CIRCUIT COURT.

December 14, 1868..

OPINION OF THE COURT BY JUDGE PETERS:

The petition in this case is fatally defective.

Without stating when the license to keep a coffee-house was granted, but leaving all the dates in blank, it is alleged that the predecessors of the then trustees did grant him a license to keep a coffee-house in said town for the term of one year at the rate of one hundred dollars per year; the meaning of which is uncertain and ambiguous, and is rendered still more obscure and uncertain by the following sentences, viz: They state that said Wittv under the understanding with said trustees of said town, did sell liquor as a coffee-house keeper in said town, and it was due and owing said trustees for the use of the town of Edmonton the sum of \$75 \$25 having been paid by him to said trustees.

There is no allegation that the trustees had the lawful authority to require of appellant the sum of one hundred dollars for license to keep a coffee-house, nor that if they had the power they exercised it, nor that he promised or agreed to pay it. Such pleadings did not entitle the appellees to a judgment. Wherefore the judgment is reversed, and the cause remanded, with direction for further proceedings not inconsistent with this opinion, and if appellees do not amend their petition on the return of the cause the same should be dismissed.

James, for appellant.

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HARRISON C. BARKLEY v. JOSEPH RUSSELL.

s—Defective Title Cured during Pending of Suit for Purchase Money.

A defendant to a suit to enforce a purchase money claim, is entitled to a judgment for costs, where the defect to the title is cured during the pending litigation.

Counter-Claim—Defective Title—Pleading.

A defect in the title to land, is properly the subject of a counter-claim, in a suit to enforce purchase money notes.

APPEAL FROM MONTGOMERY CIRCUIT COURT.

September 10, 1868.

OPINION OF THE COURT BY JUDGE HARDIN:

This was an action against the appellant upon his note for \$121.64 purporting to have been given for a balance of the price of a tract of land.

The answer, which is styled a counter-claim, states the consideration of the note to be the balance of the price of land sold by the plaintiff on the 15th of September, 1856, the date of the note to the defendant, executed a deed to the defendant for the land, the defendant claims he did not accept the deed nor authorize the clerk to receive and record it, that the plaintiff was a non-resident and was liable for the breach of his original contract, or in compliance with it, to convey a good and sufficient title, and for the encumbrances of the land and certain alleged interferences of adverse claims, the defendant seems to seek an abatement of the note rather than a rescission of the contract.

And by an amended answer the note as for the balance of the land, described in the deed as containing 168 acres and 30 poles, is alleged to be for more land than the tract really contained, if actually estimated by horizontal measures as required by the original contract, instead of surface measure as expressed in the deed, on this ground an abatement of the note is sought.

A reply was filed by the plaintiff, exhibiting title papers and showing the plaintiff had removed from the land the incumbrance of Mrs. Buckner's right of dower, pending the suit, but this reply

does not controvert the alleged non-acceptance of the deed, nor deny certain alleged defects of title.

A judgment was rendered for the plaintiff for the whole amount of his claim and for four-fifths of his costs, one-fifth of his costs being withheld because the title was defective and appeared to have been perfected during the pendency of the suit.

From that judgment this appeal is prosecuted.

In any view of the case as regards the alleged deficiency in the land, it seems to us the defendant was not liable for the plaintiff's costs, but was entitled to a judgment for costs, as under the circumstances the defect of title, although cured pending the suit, was properly the subject of a counter-claim, if not otherwise an available defense when the answer was filed.

It is also insisted for the appellant that although the evidence conduces to the conclusion that the deed was accepted and the note given at the same time for the true balance of the price according to the contract, as expressed in the deed; yet as the plaintiff failed to controvert the alleged non-acceptance of the deed by which alone the contract is shown to have contemplated or adopted the survey of the land by surface measure, and as the quantity is thus shown to be greater than would have resulted from a legal survey, the plaintiff is concluded by the pleading from relying on the acceptance of the deed and the facts thereby shown.

But as the failure to controvert in the reply, the averment of the answer referred to, may well have resulted from the difficulty in determining its character, as a pleading, and whether so much of it as alleges the non-acceptance of the deed in connection with the supposed deficiency and consequent excess of the amount of the note, ought or not to have been treated as merely a plea of partial failure of the consideration, instead of a counter-claim requiring a reply, it will be proper on the return of the cause to allow either party to amend his pleading in the matters referred to, so as to make it distinct and conformable with the rules of the code of practice.

For the errors we have indicated, the judgment is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Turner, for appellant.

Hazlerigg & Winn, for appellee.

A. B. NORWOOD ET AL v. W. H. ROBINSON.

Husband and Wife—Vuntary Conveyance—Void as to Subsisting Debts.

A subsisting debt, founded on a valuable consideration, is held to be sufficient to authorize the cancellation of a deed from a husband to wife, made after the creation of the debt.

APPEAL FROM JEFFERSON CIRCUIT COURT, CHANCERY DIVISION.

September 29, 1868.

OPINION OF THE COURT BY JUDGE PETERS:

It appears in the supplemental record that the judgment of the 22nd of September, 1865, and from which this appeal is prosecuted, as the memorandum on the original record of counsel shows, was after its rendition set aside, and all proceedings under it. A summons was then sued out against the infant and executed on her defendant, and a guardian *ad litem* then regularly appointed, who filed an answer and the final decree pronounced the 27th of October, 1866, from which there seem in fact to be no appeal.

But it is deemed best to finally dispose of this case now as it may be, or must have been the intention of counsel to have this last decree reviewed.

The alleged error that final judgment was rendered against the infant defendant before service of process, as already noticed, was a misconception of the proceedings.

The commissioner's report of the indebtedness of A. B. Norwood to appellee is fully sustained by the proof, and presents the correct state of the accounts between the parties.

The deed of A. B. Norwood to his wife, and daughter, was subsequent in date to the creation of the debt of \$450, it was a subsisting debt, founded on a valuable consideration at, and before the making of said deed, and as it was merely voluntary, it was void under the statute as to prior creditors, hence the court below properly subjected the house and lot to the payment to that as well as the debts for which the mortgage was executed. Perceiving, therefore, no error in the judgment, the same is affirmed.

Brown, for appellant.

Harrison & Bennett, for appellee.

GEORGE S. ALLISON v. BUSH & SHIVELL.

Partnership—Silent Partner—Abuse of Confidence and Trust.

Allison and Bush, appellee, were friends, and business associates in the banking business. Bush and Shivell, appellees, were law partners, Shivell and Allison, each owned a share in a mining enterprise, and Bush was the silent interested partner in the share of each. Bush persuaded Allison to buy another share, engaged to negotiate the purchase and promised to secure it at cost, to Allison. Bush and Shivell bought a share of Bright for \$500 and had it transferred to Shivell who transferred to Allison. Bush then informed Allison a share had been bought for him. Bush and Shivell then bought a share from another party, for \$1500, no payment being made on same. Appellees made draft on appellant for "purchase money for the Bright interest" etc, and the \$1500 was paid. In a suit to recover \$1,000, held that the transaction was a combined abuse of confidence and trust and appellant entitled to restitution of the difference in price of the two shares.

APPEAL FROM LOUISVILLE CHANCERY COURT.

September 26, 1868.

OPINION OF THE COURT BY JUDGE ROBERTSON:

It seem to this court that a close analysis of the pleadings and evidence presented in the record of this case, must result in the logical and consistent and only judicial conclusion that the appellant is entitled to relief as sought by his petition. The following facts, sufficiently established, authorize this deduction:

1. The appellant and the appellee Bush were intimate friends, standing in the confidential relation of cashier and director of the same bank in the city of Louisville.

2. The appellees Bush and Shivell were associated in the confidential relation of partners in the practice of law in the same city. Shivell was the holder of a share of one-fourth in "The Riggs Tiven Mining and Manufacturing Company," and Bush, as indicated by his own testimony and other circumstances, was a dormant partner in the profits of that share and also of the share bought by Bush from Shivell for the appellant.

3. Bush persuaded the appellant to buy a share in said company, engaged to negotiate the purchase for him at as low a rate

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as he could and promised to charge him only what the share should cost.

4. That, in a few days afterwards, on the 15th of June, 1865, Shivell bought from an original stock-holder, D. Bright, his share of one-fourth for the price of \$500 and some indefinite costs, and between that date and the 8th of July, 1865, Bush reported the purchase of a share from Shivell for the appellant and Shivell transferred it to the appellant.

5. On the 1st of July, 1865, Shivell's brother transferred to him a share for the ostensible price of \$1,500, but a credible witness testified that more than a year afterwards that brother told him that he "had received nothing and did not know that he ever would," this fact, connected with the incredibility that the appellee Shivell would give \$1,500 for a share when he had about two weeks before bought one for about \$500, and too when he seemed anxious to sell, authorizes the inference that the purchase from his brother was a sham, contrived as a pretext for extorting \$1,500 from the appellant on the pretence that he had bought that share at that price for him, when in fact he had bought only Bright's share and owned no other except his own, which cost him nothing.

6. On the 8th of July, 1865, the appellee Bush drew on the appellant in favor of the appellee Shivell for \$800 "of the purchase money for the *Bright interest* in the Rigg Tiven lead mine," and on the 1st of September, 1865, the appellee Shivell drew on the appellant in favor of the appellee Bush for "\$700 balance on the one-fourth interest *purchased* for you."

7. It is almost certain that the purchase of a share for appellant was made before the 1st of July, 1865, and consequently it must have been Bright's share that was bought for him.

From these significant facts we cannot resist the conclusion that the appellees combined to make about \$1,000 out of the appellant as a joint speculation on abused confidence and trust. And that the share bought for him was Bright's. Consequently they deceived the appellant and extorted from him about \$1,000 more than they were entitled to demand or could justly receive.

Wherefore, the decree dismissing the appellant's petition is reversed and the cause remanded for a judgment in his favor against the appellee for \$1,000 with interest from the time they received it, which amount, however, may be diminished by the

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costs Bright says he was to get in addition to the \$500, leave to prove which is allowed.

Bullitt, for appellant.

Pirtle, for appellee.

A. M. NORTH v. W. T. HAGGIN'S ADMR.

Statute of Limitations—Renewal of Notes—Usury.

A substitution of new notes for old ones, where none of the principal is paid, is a continuance of the loan, and the statute of limitations will not bar a recovery of any usury paid thereon.

Bills and Notes—Purchaser for Value—Sale of Notes.

Haggins made application of Fry to secure for him \$5,000. Brent conducted negotiations. Fry sought and secured the money from one W. W. North, son of and agent for A. M. North. The notes of Haggins were made to and endorsed by Brent, and delivered to W. W. North. Held to be a loan of money and not a sale of notes to A. M. North.

APPEAL FROM LOUISVILLE CHANCERY COURT.

February 21, 1866.

A suit was filed by an administrator to settle the estate of W. T. Haggins. Among the liabilities were notes aggregating \$4,200, given by Haggins to appellant North. The evidence was that in 1856 Haggins applied to W. W. Fry, attorney, to secure for him \$5,000.00. This application was made by T. Y. Brent for Haggins. Fry was the attorney and advisory counsel of appellant, and sought and secured the loan through W. W. North, son and agent of appellant, the notes and mortgage being made to T. Y. Brent, and endorsed by him over to the appellant. Notes were executed, one for \$5,000.00 without interest, and ten for \$250.00 each, payable semi-annually, and bearing interest at 10 per cent. All of these latter notes were paid at maturity, but before the due date of the large note, Haggins applied for an extension of five years. The old note and mortgage was cancelled and new notes and a mortgage was executed, the notes being one for \$250.00 and nine

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for \$500.00 each, payable semi-annually, a payment of \$250.00 cash having been made. Notes bear interest at ten per cent.

The administrator seeks to cancel such of these latter notes, as will amount to the usury, as shown in the transaction. A commissioner's report showed usury of \$1,520.00, which was purged. From a decree of the chancellor, sustaining the report of the commissioner, this appeal is prosecuted.

OPINION OF THE COURT BY JUDGE ROBERTSON:

The facts conduce to show a loan of money and not a sale of notes. And the ten notes for \$250 each, payable semi-annually, were evidently given for ten per cent interest on the loan of \$5,000 for five years.

The last contract seems to have been only an extension of the loan at the same rate of interest, and we are unable to see in it anything like a purgation of usury.

And, as the principal of the original loan was not paid and the new notes were substituted for prolonging the loan, the statute of limitations did not bar a recovery of any of the usury which had been paid.

Nor can we judicially know that the payments were made in a depreciated currency of less value than that which was loaned; nor can we presume, without either allegation or proof, that, if the payments were made in a paper medium, it was not voluntarily accepted at its nominal value. And we do know that according to a late decision by this court, the appellant cannot, while that decision shall stand as the law of the State, be compelled to accept, for the principal she loaned, any thing but gold or silver at its standard value.

Consequently we perceive no error in the judgment for reclamation of four per cent usury—paid on the continuous loan.

Wherefore, the judgment is affirmed.

WILLIAM LACKEY ET AL *v.* H. F. BLANDY.**Demurrer—Pleadings—Allegations in Answer Taken as True.**

A demurrer to an answer to a petition that alleges the acceptance by plaintiff of new notes with security, in settlement of those sued on and which were secured by a mortgage, should be over-ruled as it is an admission of the facts as alleged in the answer.

Bills and Notes—Contract for Payment in Lumber.

A contract for delivery at a given point, of personal property, in settlement of notes, though the property be not accepted, the debtor is entitled to recover against the creditor the value of such of the property as was lost by reason of the creditors negligence.

APPEAL FROM MARSHALL CIRCUIT COURT.

October 20, 1868.

This was a suit to enforce payment of the balance of the purchase price of a sawmill outfit. The petition avers the execution and delivery to plaintiffs of two notes of \$500 each, due four and eight months, and a mortgage upon the outfit to secure same; that afterwards, Thomas S. Lackey and William Lackey, appellants, executed two notes for \$539 each in two and four months, and additional security for the two notes first given. Defendants answering, denied that the mortgage was given at the time of the execution of the notes, but at plaintiff's urgent request, was executed some two months afterwards; that the last two named notes were given, with Thomas S. Lackey as security, in full satisfaction of the notes of \$500 each and the mortgage, and that it was afterwards contracted and agreed that defendants could deliver for plaintiffs on the Ohio river at Hamlettsburg, Ohio, 100,000 feet of lumber at \$12.50 per thousand, to be in full satisfaction of the said last two notes. That pursuant to said agreement, they delivered the lumber at the place designated, and that by reason of the failure of plaintiffs to give them the benefit of the value of said lumber, they claim damages in the sum of \$1,500. A demurrer was filed to the answer, and sustained. An amended answer was filed, alleging payment in full of the notes.

The evidence showed that a contract was made with the agent of plaintiffs for the lumber as alleged in defendants answer, and

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that about 100,000 feet was placed on the bank of the Ohio river, in easy access for shipment, within the agreed time, and that afterwards, during high water, part of it was washed away.

From a verdict and judgment for plaintiffs, defendants prosecute this appeal.

OPINION OF THE COURT BY JUDGE ROBERTSON:

The allegations in the answer, that the new notes with surety were accepted as satisfaction of the debt previously secured by mortgage, were admitted by the demurrer. And these allegations are, as thus admitted, sufficient for waiving the mortgage. The demurrer ought therefore to have been overruled.

It seems to us also that the allegations and proof as to the contract for lumber, and the delivery of it on the bank of the Ohio, prima facie entitle Lackey to at least the value of so much as was lost to him.

Wherefore, the judgment is reversed and the cause remanded for further proceedings.

Dabney, for appellant.

Palmer, for appellee.

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KENTUCKY IMPROVEMENT CO. *v.* B. W. WARD.

Navigation—Obstruction in River—Damage to Water Crafts—Instructions.

In a suit by appellees to recover for damages to their flat boat, caused by the temporary erection of a dam across the river by appellants, and for which a verdict and judgment was rendered, the following instructions "that the liability of appellants is made to depend on the question whether the accident occurred without the fault of appellees, and alone from obstructions to navigation caused and kept in the river by the appellants other than such as were merely necessary to enable them in a reasonable time to repair their mill dam," is held to be the correct rule of law therefor.

APPEAL FROM GREENUP CIRCUIT COURT.

December 1, 1868.

OPINION OF THE COURT BY JUDGE HARDIN:

The appellees sued the Kentucky Improvement Company for damages sustained by the wreck of their flat boat loaded with tan bark, in the Little Sandy river, in consequence of obstructions to navigation placed in the river by the defendants.

The facts were that the defendants, as owners of the Aginglite Mills on said river, were entitled by legislative recognition and prescriptive right to the privilege of continuing to obstruct the river with their mill dam as erected years before. This dam was partially washed away in June, 1866, and the owners constructed a temporary dam of brush, straw, &c., extending across the channel formed by the breach in the old dam, so as to connect the remaining part of it with the opposite bank of the stream, some sixty yards above the site of the old dam at its connection with the east bank of the river. The current of the river had broken around this obstruction of brush on the east side of the stream and formed a crooked chute, large enough to admit of the passage of a flat boat, but dangerous from its shape and the force of the current, as well as the proximity of the remaining portion of the old dam. About the first of August, 1866, the boat of the appellees ascending the river in the night time, in passing through said chute at the end of the brush dam, struck it and was thrown against a log and then against the old dam in passing through it and bilged and sunk.

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The defendants relied in their defense that they had a right to obstruct the temporary dam as a means of repairing the other, that the accident was not the consequence of any fault on their part, but of the negligence and unskillfulness of the plaintiffs in attempting to pass the obstruction in the night and when the water was at too low a stage to admit of the safe passage of the boats. A verdict and judgment were rendered for the plaintiff for \$100 and the court having overruled a motion for a new trial, the defendants have appealed to this court.

The main inquiry is whether or not the court correctly instructed the jury. By the instructions given the liability of the appellants was made to depend on the question whether the accident occurred without the fault of the appellees and alone from obstructions to navigation caused and kept in the river by the appellants, other than such as were merely necessary to enable them in reasonable time to repair their mill dam. And in this we think the court correctly expressed the law of the case. The verdict of the jury does not appear to have been excessive, but was such as they might properly have found from the facts.

Wherefore, the judgment is affirmed.

Frederick Ireland, Dulin, for appellant.

John Whister, for appellee.

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E. M. STONE v. EDWARD L. MINTER ET AL.

Wills—Construction of—Word “Child or Children” Used in Devise.

A will contained the following clause, “I give and bequeath to my son Edmund S. Lampton eight acres of land x x x And if said Edmund shall die without lawful issue, it is my will and desire, and I do hereby direct, that the estate herein devised to him shall go to his sisters in equal proportion, and if either or both of them be dead, to the child or children of such dead sister, the children taking the share of the dead parent.” Held, to mean that grandchildren of either of said devisees, would not participate in the distribution of the estate of said Lampton, at his death without issue, but would descend to the children only.

Wills—Use of Word “Child” to Denote Meaning Thereof—Words and Phrases.

The use of the word “child” or “children” in a will, to be enlarged beyond its ordinary and popular signification is only permissible, either from necessity, where the will would be otherwise inoperative, or where the testator has shown by other words in the instrument that he did not use it in its ordinary and popular meaning, but in a more extended sense.

APPEAL FROM LOUISVILLE CHANCERY COURT.

December 1, 1868.

OPINION OF THE COURT BY JUDGE PETERS:

In April, 1823, the last will and testament of Mark Lampton was probated in the court of the county of Jefferson. Which will contains the following clause:

“I give and devise to my son, Edmund S. Lampton, and his heirs and assigns forever, five negroes, to wit: Daniel James, Melinda, Smith, son of Aggy, and Paulina, daughter of Aggy, and the future increase of said females.

“Also eight acres of land, lying and being in Louisville aforesaid, on the western side of my ground in the range of twenty-acre lots, to be bounded on the west side by Campbell street aforesaid, which runs through the twenty-acre lot number two, and to extend from said street eastwardly equal distances along said South street, and th

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southern boundary of said grounds to include the said eight acres of land, with all the appurtenances. The said slaves Melinda, Smith and Paulina shall be delivered to the said Edmund S. Lampton, his heirs or assigns, immediately after my death, and the said Daniel and James and said eight acres of land with the appurtenances, after all my debts shall be paid. And if the said Edmund shall die without lawful issue, it is my will and desire and I do hereby direct, that the estate herein devised to him shall go to his sisters in equal portions, and if either or both of them be then dead, to the child or children of such dead sister, the children taking the share of the dead parent."

At the death of the testator he left three children surviving him, : His son, Edmund S. Lampton, Mrs. Minerva L. Stone, wife E. S. Stone, and Fanny M. Lampton, now the wife of Thomas Crutchfield.

Mrs. Stone survived her husband, E. S. Stone, by whom she had a son, E. M. Stone. She then married Minter, by whom she had a son, Marion F. Minter, and died, M. F. Minter married and died, leaving two infant children, Edmund Lane Minter and Mary S. Minter.

In 1865, after the death of his sister Mrs. Minerva Minter, and her son Marion F. Minter, Edmund S. Lampton died, without lawful issue, as is alleged, and this action was brought in the Louisville chancery court by Crutchfield and wife against said E. S. Stone and E. L. and M. S. Minter, and quite a number of tenants, for partition and to be put in possession of the one-half of the eight acres of land devised by the father of Mrs. Crutchfield, the clause of the will quoted.

E. M. Stone filed his answer, making it a cross-petition against E. L. and M. S. Minter, claiming that he is entitled, under his grandfather's will, to one moiety of the eight acres of ground, to the exclusion of his said nephews and niece. They being infants, answered by guardian *ad litem*. Controverted the claim of E. M. Stone to a moiety of said land, and asserted claim to one-fourth thereof, as the children of M. F. Minter, the deceased son of testator's daughter, Minerva.

To their answer Stone demurred, and the *chancellor* having overruled the demurrer and sustained the claim of the Minters to one-fourth of the land, Stone prosecutes this appeal.

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What is the proper construction and legal effect of the devise to the son of the testator of the eight acres of land, and in the event of his death "*without lawful issue*," then over, is the sole question presented on this record?

It is contended on the part of appellant, that the words *child*, or *children*, as used by the testator in this clause of his will, were used in their ordinary, popular sense, and not to denote, nor embrace, grand-children. While for the appellees, it is contended that upon the happening of the contingency provided for, the estate was to pass to the testator's daughters, and if either, or both, were dead, then to their families as a class, and therefore grand-children were to be included.

The testator died, as already observed, in 1823, and as his will must be considered as speaking at his death, the question must be decided without reference to the act of 1839, or the Revised Statutes whereby the rule on the subject has been modified.

In *Churchill vs Churchill*, 2 Met., 466, this court said the technical, legal import of the word "*children*" accords with its ordinary and popular signification; it does not denote grand-children; and though sometimes used with that purpose and effect, there is no warrant for thus enlarging its meaning in construing a will, unless indispensably necessary to effectuate the obvious intent of the testator.

It may be regarded as well settled that such enlarged or extended import of the word "*children*" when used as descriptive of persons to take under a will, is only permissible in two cases. First, from necessity, where the will would be otherwise inoperative, and, second, where the testator has shown by other words in the instrument, that he did not use it in its ordinary and popular meaning, but in a more extended sense. As sustaining the rule here stated, several authorities are cited, and it is said that upon the question there is no conflict in the authorities.

And in *Yeates and wife vs. Gill, &c.*, 9 B. Mon., 203, this court said, after reciting the rule,

"and it has also been held as a consequence, that where neither of these grounds exists, grand-children cannot take with children under the latter term used as descriptive of the class; nor great-grand-children with grand-children under the latter description."

In this case the testator devised his estate to his said six

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children, whom he had previously named, saying "*Enoch's children being in his place*. At the date of the will there were three of the children of Enoch living. But before the death of the testator, a daughter of his son Enoch, who had married Gill, died, leaving four infant children; Enoch Bruton, Jr., the son of Enoch, Sr., had died a minor, childless, and unmarried, leaving, of the three children of the testator's son Enoch, only one living at his death, a daughter, who had married Yeates, and he claimed all the estate devised to the children of his wife's father, to the exclusion of the children of her deceased sister Mrs. Gill. And in the opinion, it is said that according to the principles of the rule of construction as therein stated, Mrs. Gill's children, the grand-children of testator's son Enoch would be entitled to nothing, because one of the children of Enoch was living at the death of the testator, and they were not his *children*." But under the provisions of the Statute of 1839, Mrs. Gill's children were adjudged to be entitled to the one-half of the estate devised to Enoch's children, the testator having died in *October, 1847*, after the act took effect.

In *Hughes vs. Hughes*, 12 B. Mon., 115, the court recognized the rule as authoritatively settled that the word *children* is not construed to embrace grand-children, unless there be something contained in the will which manifests the testator's intention by the use of the word, to include not only his children, but also his grand-children. In that case the grand-children were adjudged to be entitled to take a part of the *residuum*; because in the clause of the will under which claim the testator used the word "*heir*" first, and then children, referring to the same persons throughout, and using the word children synonymous with *heirs*.

In the case at bar the necessity does not exist, that appellees should take in order to make the will operative, because appellant can take under the precise designation given in the will. And the whole instrument will be read in vain to find a sentence, or single word, showing that the testator did not use the words child or children, in their ordinary and popular sense.

It may be, that an adherence to this rule of construction may impose a hardship on appellees, and which, if testator could have foreseen, or had known that an express provision was necessary to prevent, would have provided for; but be that as it may, the court cannot be indifferent to the fact that departure from authoritatively settled rules, entail evils on the country, which greatly

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overbalance any good that may result in the relief of an isolated hard case. Besides, the rule has now been modified by legislative enactments, and its operation will be limited necessarily to a very few cases hereafter.

Under the weight of authority, therefore, the court feels constrained to reverse the judgment of the chancellor, and remand the cause, with directions to sustain appellant's demurrer to the answer of appellee, and for further proceedings consistent herewith.

Cardwells, Pirtle & Caruth, for appellant.

F. Hagan, for appellees.

SAMUEL MOORE AND THOMAS J. KENNEY v. JAMES M. STONE.

Highways—Abandonment of Public Road.

The close proximity of a public road, constantly used, to one beneficial only to a few nearby private individuals, where it is shown that there is not sufficient labor, to keep in repair both, will justify the abandonment of the lesser used road by order of the court.

Words and Phrases—Description.

The use of the words "about ten feet north" in a suit for a discontinuance of a public road, to designate the terminus of the part of the road sought to have abandoned, is held sufficiently certain as a description of the point it was desired to discontinue at.

APPEAL FROM SCOTT CIRCUIT COURT.

December 13, 1867.

This was an action brought in the Scott county court to close a certain road, which is alleged to be little traveled, and expensive to keep in repair. The road was less than a mile in length, and only two parties lived on same, one of whom was in favor of closing it. Another public road, was within a short distance, paralleling it within a half to three-quarters of a mile. The evidence showed that the road would be of no particular injury except to appellant Kenney, and would only affect him to the extent of causing him to drive about half a mile further to reach the turnpike, to which both roads lead, in a parallel line. That the road had

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not been worked for years, was travelled but little; not in condition for vehicles to travel it, with safety, and if compelled to be worked, sufficient hands could not be found to keep it in repair without neglect to the other and more traveled public road, running parallel thereto, and which was constantly used by the public generally.

From a judgment, ordering the closing of the road, defendants appeal.

OPINION OF THE COURT BY JUDGE WILLIAMS:

The almost entire neglect to work and improve the mill-road for several years and its almost wholly unfitness for passage of carriages, wagons or other vehicles, strongly indicate its public insignificance. Besides the evidence preponderates to establish that few, if ever, horseback travellers used this road.

The close contiguity of this road to other more used public roads and the necessity to concentrate the labor so as to improve the more important ones, so as to make these safe and convenient for the public, authorized the circuit court to adjudge discontinuance. We also think that "*about ten feet north*" of a designated gate is sufficiently certain as a description of the point it was desired to discontinue at; this literally signifies "*near to*" a point ten feet from the gate, and means less than a foot either over or under ten, and legally means ten feet from the gate as heretofore decided by this court.

Judgment affirmed.

Darnaby, for appellant.

Beck Prewitt, for appellee.

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ISHAM HENDERSON v. WILLIAM J. HEADY.

WILLIAM J. HEADY v. ISHAM HENDERSON.

Partnership—Discontinuance by Acquiescence in other Dealings.

The acquiescence of one partner in acts by the other, which conducted to prove a dissolution of a former partnership, will bar any recovery of a share of profits made in all transactions subsequent to the alleged dissolution.

Partnership—Profits—Proof as to, etc.

In the absence of definite proof as to the specific purchase price of horses for a partnership, which had been formed to furnish horses to the Government, it is sufficient to average the whole upon a basis of what the evidence shows was paid for a portion of the stock.

APPEAL FROM LOUISVILLE CHANCERY COURT.

November 27, 1867.

These parties entered into a contract to buy horses, to be sold to the United States Government, to be furnished in lots of one hundred at a time. A contract had previously been made by Henderson with the Government, whereby, amongst other conditions, the horses were to be inspected, and such as were accepted, to be paid for at \$96 each. Henderson was to furnish the funds necessary to buy the horses and Heady was to attend to the buying, delivering, etc. Up to July 8th, 1862, 479 head had been purchased, and on that day, Heady retired from the partnership. The averments of the petition were that Heady owned a two-fifth interest in the partnership, but in making up his report, the commissioner allowed and rendered his final report upon a one-half basis. In the commissioner's final report, he showed sales to and receipts from the government of \$43,104 up to July 21, 1862, and also receipt of \$1,312.50 from the sale of 30 head, at auction, which it seems had been rejected. All of this fund went into the hands of Henderson. He was credited with cash advanced \$20,211.50, and payment for 244 head at \$80 each, average price, no specific proof being offered for the actual purchase price of every animal, and was also allowed sundry expenses necessary to the conducting of

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the business, making a total of \$41,381.05, showing a balance of profit of \$3,035.45. The petitioner alleges that his retirement from the partnership was brought about by the reputed sale by Henderson of the Government contract to one Gaslin, but that the transfer was made to defraud him of his share of the profits, Henderson, without rendering an accounting, informing him that they had lost considerable money by the transactions, all of which is denied in the answer. From a judgment for an equal division of the profits, defendant appeals.

OPINION OF THE COURT BY JUDGE ROBERTSON:

The pleadings and facts are so confused and obscure, in this case, as to leave the judicial mind in vexatious doubt as to the *precise* rights of the parties. We are, however, satisfied that Heady, if profits were made, is entitled to some portion of them. But whether or not he concurred in Henderson's transfer, when it purports to have been made, or whether or not the transfer was merely ostensible and Henderson was still the beneficial party, Heady soon apparently acquiesced and ceased to act as partner.

On this basis the commissioner's last report is very able and seems to approximate the truth as nearly as the chaotic record will enable any enlightened and impartial mind to reach it.

We cannot, therefore, decide that there is any available error in the reported amount of profits of which Heady is entitled to a share. And consequently, so far the chancellor's confirmation of the report is approved.

But it seems to this court that the chancellor erred in adjudging to Heady one-half, instead of two-fifths which only his petition claimed and which the record strongly tends to prove as his conventional portion.

Wherefore, for this error alone, the judgment is reversed, and the cause remanded for a judgment conformable with this opinion.

Thompson, for appellant.

Caldwell, for appellee.

A. J. WRIGHT'S ADMR. v. DAVID GILLUM.**Husband and Wife—Lands Purchased by Wife—Erroneous Conveyance to Husband.**

A deed from husband to wife, though technically invalid, is held good, where it is shown that the land embraced therein was paid for by the wife out of her patrimony and the deed made to the husband through mistake.

Same—Creditors Suit—Lien Created by Payment by Wife.

In a suit by a creditor to subject the lands in the name of the wife, conveyed to her by her insolvent husband, it is held that the wife will have a prior lien thereon for moneys she paid for the land out of her individual means.

Same—Sales—Oppressive Costs.

A sale of the lands upon which a lien is thus created, to reimburse the wife, is held unjudicial where the value of the land is shown to be no more than the price paid by the wife for which she holds a lien, and would create inconvenience and oppressiveness in its cost

APPEAL FROM TRIMBLE CIRCUIT COURT.

December 12, 1868.

OPINION OF THE COURT BY JUDGE ROBERTSON:

It seems to this court that the circuit court did not err in dismissing the appellant's petition as judgment creditor of the appellee David Gillum, to subject a tract of 30 acres of land, which had been conveyed to him by Elizabeth Bates, and afterwards conveyed by him to his co-appellee Mary Jane Gillum, his wife.

The husband resists the asserted equity by alleging that the land was bought at his wife's instance for a home for herself and six children, was paid for with her own separate means and ought to have been conveyed to her by Mrs. Bates.

The wife resists more emphatically on the same grounds, alleging that her husband and herself had no other means of buying the land than a small patrimony which she then expected soon to realize from her father's estate, and which she received to her separate use about three years after the land was bought at \$100, paid by her husband with money borrowed from one Barres in an-

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icipation of her patrimonial fund. And that she afterwards, with a portion of that fund which never came to her husband, paid to Barres the whole amount so loaned and its accruing interest of course; that Mrs. Bates conveyed the legal title to her husband instead of herself through mistake, and that she paid Barres in consideration of her husband's conveyance to herself. And the most essential of these allegations are sufficiently established by the testimony.

Now although the conveyance by the husband to his wife is technically invalid, yet the contract between them and her payment of the consideration may be available to rebut the asserted equity of the appellant and she would at least be entitled to a lien on the land for the money she paid for it and that, from the testimony, may be presumed equal to the present value of the land, an experimental sale of which for reimbursing her would be not only inconvenient but oppressive in its cost and probably altogether unavailing to the appellant.

A decree for such a sale would therefore have been improvident, and a reversal by this court would be more so.

Wherefore, the judgment is affirmed.

DeHaven, for appellant.

Pryor & Chambers, for appellee.

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GRANVILLE H. VAUGHN ET AL v. G. W. EDWARDS ET AL.

Guardian and Ward—Duty of Guardian to Make Proper Report.

The purchase by a guardian, of a portion of an estate of a decedent, and execution of his note therefor to the father of his wards, will not relieve him of his duty to report the indebtedness to the proper court as the estate of the wards in his hands.

Purchase of Personal Property by Wards Credited to account of Guardian.

Where minors, purchase at a judicial sale, personal property, of the estate of which they are heirs and take possession of and use the same, continually, their guardian should be credited against an estate under his control with the amount bid by the ward's. Or upon an adjustment of accounts said property should be turned in to the hands of the guardian.

Principal and Surety—Judgment against Principal Alone—Erroneous.

In a suit on a guardian's bond, a judgment against the principal alone, is erroneous. It should be against the principal and his sureties.

APPEAL FROM GREEN CIRCUIT COURT.

December 19, 1868.

OPINION OF THE COURT BY JUDGE PETERS:

John Edwards, a citizen of Green county, departed this life intestate in 1842 possessed of a valuable estate in land and slaves, leaving Mrs. Ann W. Edwards, his widow, surviving him, and seven children, his heirs.

His daughter Elizabeth who had married Dr. A. M. Jones perhaps in 1841 died in 1845 leaving her husband and two daughters, Velotte and Mary, of very tender years, surviving her.

Dr. Jones, on the division and distribution of the estate of intestate Edwards, received in right of his wife, and before her death, the one-seventh of his estate, after the assignment of dower to his widow. Upon the death of Dr. Jones' wife, his children were taken by their grand-mother, Mrs. Edwards, to her home, and she cared for, educated and supported them till her death, which occurred in 1865; perhaps the older one married a short time before the death of her grand-mother.

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Their father, Dr. Jones, was not successful as a business man, and prior to 1855 had failed, the estate which he got in right of his wife, except that which he might be entitled to on the death of his mother-in-law, was all gone, and as he claimed the right to the one-seventh of the dower slaves after the termination of the life estate, their grand-mother might well suppose that that remnant of their mother's fortune would be lost to them. Prompted by her affection for these grand-daughters, intensified doubtless by their misfortune in the early death of their mother, whose place she had hitherto filled, but which, her advanced age warned her, she must soon surrender, and their destitute condition when bereaved of her, she determined, if in her power, to secure to them this interest claimed by their father in the dower slaves; he was approached and her sons consulted on the subject; in her efforts to accomplish her purpose, she was informed that she must surrender her life interest in four very valuable slaves, worth nearly \$1,200 each, and their annual hire, we are authorized to assume, worth not less than \$500, who were to be sold and their price divided amongst the remainder men; this she consented to, the slaves were sold, and appellee George W. Edward bought from Dr. Jones the one-seventh thereof, and on the 12th day of January, 1856, executed his note to him for \$657.85-100, due one day after date; this note was executed after the four slaves had been sold under a decree of the Green circuit court; the transfer of Dr. Jones' interest in said slaves to said appellee had been made about one year before, as is shown by a writing signed by Jones and filed as an exhibit, dated 24th of January, 1855.

On the 17th of December, 1855, Mrs. Edwards, the widow, by a writing, released to the heirs at law of John Edwards, deceased, her late husband, all her interest in, and claim to, the services of said four slaves, and on the same day, appellee George W. Edwards was appointed by the Green county court guardian for these two infant daughters of Dr. Jones, and executed bond under said appointment with David W. Edwards and Daniel P. White as his sureties, for the faithful discharge of the trust of guardian of said wards.

In February, 1856, Dr. Jones sold his interest in the remaining dower slaves, retained by Mrs. Edwards, for \$800, to George W. Edwards, and took his note therefore bearing date the 13th of February, 1856, due one day after date; and on the 5th of March,

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1856, he assigned both of these notes to Mrs. Ann W. Edwards, for value received of her, as is explained in the assignment; these notes Mrs. Edwards retained until her death.

The wards having married, this action was brought in April, 1867, by their husbands, and them jointly, against George W. Edwards, and the sureties in his guardian bond, to compel them to account for the two notes executed by said G. W. Edwards to Dr. Jones, and the accumulated interest; the relief sought was resisted on the ground that nothing ever came to the hands of the guardian belonging to said wards, that the \$800 note had been satisfied in slaves surrendered to the wards before their marriage, and upon the ground that they have no interest in said notes.

The circuit judge rendered judgment against George W. Edwards alone for the note for \$659.85-100, and dismissed the petition as to the sureties, and to correct the alleged error for failing to render judgment for both notes, against said Edwards and his sureties, this appeal is prosecuted.

Although the plan adopted to effectuate the intention of the parties was not the most direct and skilful, yet they consulted a lawyer, and he seems to have advised the course pursued, and the evidence conclusively establishes the fact that Mrs. Edwards paid nothing to Dr. Jones for the two notes on George W. Edwards; they were not assigned to her in consideration of her care and expense in maintaining and educating her grand-daughters; she made no charge for that, and Dr. Jones proves that she gratuitously surrendered to him the note she held on him, after he had assigned the notes to her, and he proves the purpose for which the assignment was made, and the most incredulous cannot read the evidence in this case and avoid the conviction that said notes were placed in the custody of Mrs. Edwards for the benefit of her said grand-daughters. Why did she not collect, or attempt to collect, them; and especially after she ascertained that her son, the obligor, was in failing circumstances, if such was not the intention?

She certainly could not have surrendered up her life estate in four valuable men slaves, over twenty, and under thirty, "*years of age*," to enable Dr. Jones to sell his claim to a reversionary interest in one-seventh of her dower slaves to her son, that she might be enabled to get his note to pay her claim for supporting and

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educating his daughters; for the property she gave up was worth more than the notes.

But why did G. W. Edwards have himself appointed guardian for these infants? They are not shown to have had estate to the value of one dollar unless they could become the beneficial owners of said notes. And it is a fact of great significance that the very day on which the guardian was appointed, and his bond executed, Mrs. Edward's written surrender of her life estate in the four slaves was executed, which fully authorized the conclusion that the grand-mother would only execute said writing when the appointment of a guardian was made, who should be responsible for this small estate, which she was so anxious to secure for these children; it manifests her purpose, and no other motive for the surrender, and sacrifice, of her life estate in the slaves, is shown, or attempted to be shown.

Jones' cross-examination was elaborate, and vexatious, to get an explanation for the direct assignment of the notes to Mrs. Edwards, if his purpose was to secure them to his daughters, to which his answers are in substance, that the notes were to be held by Mrs. Edwards until the guardian made his report to the county court of their amount, and that he held the same as guardian, which he had promised to do. And it may be added, it was his duty to do it. Dr. Jones is fully sustained by B. Edwards, who purchased two of the four negroes sold, and proves that the guardian told him, when he paid him, his part of the money for said slaves, that he held his nieces' part as their guardian.

Notwithstanding therefore the efforts which have been made to obscure and change the true character of this transaction, it is patent from the commencement of its history to its close, that the notes of George W. Edwards were given as the evidence of his indebtedness to his wards, and were retained by their grand-mother for that purpose alone; and he cannot be permitted to escape responsibility on account of a dereliction of duty on his part, in failing to report their amounts to the proper court as the estate of his wards in his hands.

A sale was made of all, or a part, of the dower slaves in the life time of Mrs. Ann Edwards, which she may have procured to be done; under the belief it is true that George W. Edwards had failed to execute a guardian bond for the security of her said grand-daughters—and for that reason prevailed upon them, and

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actually caused each one of them to purchase a slave at said sale with an agreement that George W. Edwards should have a credit for the prices at which they purchased them.

The slave purchased by Mrs. Vaughn she took into her possession, and upon her marriage her husband took him, and retained him until he was emancipated by the adoption of the constitutional amendment, that purchase was therefore ratified by her husband after his marriage. The one purchased by her sister was also taken and kept with her at her grand-mother's during her life, and then taken with her to her father's, where she had her services until the adoption of the constitutional amendment. And although these purchases were made by the young ladies while they were minors, by the direction of their grand-mother, under the mistaken belief that George W. Edwards had not executed the guardian bond which she had been solicitous about, still the slaves were sold publicly to the highest bidder, and it does not appear that George W. Edwards either advised, or was instrumental in inducing, them to make the purchase; they did it under the advice of their grand-mother alone, and he surrendered the slaves to them, and although they were afterwards lost to them, that happened not by any fault of George W. Edwards, or any defect of title in him at the time of his sale. If therefore the slaves had not been emancipated, before appellants could in this action have made George W. Edwards, and his sureties, responsible for the whole amount of the two notes, equity would demand that they should return the slaves to him. And as without any act of his, or failure of his title, the slaves were emancipated, it is equitable and just that in adjusting these accounts between these parties, appellants should be charged with the price of the slaves purchased respectively by Mrs. Vaughn and Mrs. Rose.

For reasons stated in this opinion, the judgment is reversed, and the cause is remanded with directions to render judgment against George W. Edwards, principal, and David W. Edwards and D. P. White, his sureties, for the amount of the two notes executed by said G. W. Edwards to Dr. A. M. Jones, and by him assigned to Mrs. Ann Edwards, with simple interest from the dates when they respectively fell due, and costs, to be credited by the amounts bid by Mrs. Vaughn and Mrs. Rose for the two slaves purchased by each of them, and the difference in *the* then

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prices will be adjusted as between them in making out their separate claims.

Spencer, Chelf, Lindsey, for appellants.

James, Towles, for appellees.

W. W. WESTERN'S ADMR. v. BENJAMIN T. PERKINS.**Witness—Competency of for a Co-defendant.**

After judgment has been rendered against one of the defendants to a suit on a joint note, he is held to be a competent witness for his co-defendant in his defense to the action.

Principal and Surety—Agreement for Delay Between the Principal Debtor and Creditor—Release of Surety.

An agreement for delay between the principal debtor and creditor, will not exonerate the surety, unless it be a binding agreement, founded on a sufficient consideration, which may be enforced to the detriment of the surety by suspending the right of action and thereby obstructing his legal or equitable rights.

Same.

The partial payment by a debtor of another debt due his creditor, is held not to be a sufficient consideration to uphold an agreement for an extension on another debt, as to release a surety on same: this not being a new consideration, but a compliance with that he was already legally required to do.

Same.

In the absence of specific allegations or proof that the giving of a mortgage as additional security would have rendered an agreement to delay suing on the note for any specific time, obligatory and enforceable, it is not available as a defense for the surety, seeking to avoid his liability; but such additional security is held to thus enure to the benefit of the surety.

APPEAL FROM TODD CIRCUIT COURT.

December 15, 1868.

Opinion of the Court.

OPINION OF THE COURT BY JUDGE HARDIN:

This action was prosecuted by the appellant as the administrator of W. W. Western, deceased, on a note for \$800 executed to said decedent by W. Hearn and Ben T. Perkins on the 9th of April, 1859, and payable one day thereafter.

Perkins separately defended the action, resisting a recovery as to himself on the alleged ground that he executed the note as the surety of Hearn only, and that the plaintiff as the administrator of the payee, without the knowledge or consent of the defendant Perkins, and after the note became due, and came to his hands as administrator, entered into an agreement with said Hearn, the principal obligor, that he would not sue on the note, but would indulge said Hearn until he could make the money to pay it, provided said Hearn would pay him \$200 on another debt he owed said administrator, for which Perkins was not liable, and also execute to said administrator a mortgage of a tract of 260 acres of land as security for the two debts; and that said Hearn paid the \$200, and executed the mortgage accordingly, and the plaintiff did in consideration thereof indulge said Hearn for a time, whereby the defendant Perkins alleged he was released from liability on the note.

On a demurrer to the answer of Perkins it was decided by the court to present a sufficient defense, and a judgment being rendered against Hearn by default, the case was tried as between the plaintiff and Perkins, and a verdict and judgment were rendered for the defendant. And the court having refused to grant a new trial, said administrator has brought the case to this court.

The facts relied on by the appellee for his execution were substantially proved by Hearn, who was, we think, properly regarded by the court as a competent witness, after judgment had been rendered against him. And as the instructions given to the jury seem to harmonize with the view of the court, that the answer presented a valid defense, the main and controlling question for our determination is, were the facts alleged by the defendant sufficient to constitute a bar to the action.

We are of the opinion that they were not. The doctrine is well settled that an agreement for delay between the principal debtor and creditor will not exonerate the surety unless it be a

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binding agreement, founded on a sufficient consideration, which may be enforced to the detriment of the surety by suspending the right of action and thereby obstructing his legal or equitable rights. (Tudor vs. Goodloe, 1 B. Mon., 322; Anderson vs. Manson, 7 B. Mon., 217; Robinson, &c., vs. Miller, 1 Bush. 179). The partial payment of another debt, all of which Hearn was bound by his contract to pay, was not sufficient consideration to uphold an agreement for indulgence either on that or the debt now in controversy, because in making the payment Hearn only did what he was already legally required to do. And if the additional security of the mortgage would have rendered an agreement to delay suing on the note for any specific time obligatory and enforceable, no such agreement is alleged or proved. The promise alleged was, we think, too indefinite to be enforced, to the prejudice of the surety, while in our opinion the additional security given by the mortgage enured to his benefit and it may perhaps be yet enforced for his indemnity.

It appears from the evidence as certified in the record, although it is not alleged by the defendant, that after the execution and delivery of said mortgage to the plaintiff it was suppressed or cancelled by the plaintiff and Hearn and another mortgage was substituted for it to secure a debt in which the defendant was not bound as the surety of Hearn, and it is insisted that this transaction operated to release the appellee. As these facts were not pleaded, it would be extra-judicial and premature for us to express an opinion now as to their legal effect on the rights of the parties; but the parties will both be allowed to amend their pleadings, if they should desire to do so, on the return of the cause.

Wherefore, the judgment is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Petrie, for appellant.

Harlan, for appellee.

MARY BIRCH ET AL v. GEORGE S. MILLER'S ADMR. ET AL.

Jurisdiction over Cross-petition—Pleading.

Properly filing in the Circuit Court a petition for injunction and rescission, gave to the court jurisdiction over a cross-petition, for a specific execution and an enforcement of the lien sought to be enjoined.

APPEAL FROM MARION CIRCUIT COURT.

December 4, 1868.

OPINION OF THE COURT BY JUDGE ROBERTSON:

It is too late to inquire in this suit, into the validity or regularity of the judgment against Birch and wife; and her exoneration in this case, in consequence of her coverture, cannot operate to his prejudice.

Properly filing in the Marion circuit court the petition for injunction and rescission, certainly gave to that court jurisdiction over the cross petition for a specific execution and an enforcement of the lien. And we see no valid objection to the decree to that effect. The land seems to have been sold by the tract, and dower is not in the way.

As the purchaser under that decree of sale will get all the title of both vendor and vendee, it cannot be material whether Miller's deed was sufficient or not. But it appears to have passed Miller's title.

Wherefore, there being no substantial or available error in the judgment, it is affirmed.

Judge Hardin did not sit in this case.

A. H. Field, for appellant.

Noble, for appellee.

RICKETTS ET AL V. R. H. CRITTENDEN.

Stock Brokers—Specific Contract—Custom and Usage Amongst Brokers.

Where in the pleadings, there is a conflict as to the terms of a contract between stock brokers, and no evidence tending to establish the agreement, the court will assume the contract to be according to the custom and usage between brokers and their customers in relation to transactions of a like character.

Same.

A broker is bound to obey strictly the orders of his customers or principal in relation to keeping or disposing of stocks in his hands, and so long as the principal keeps up his margin, the broker is not authorized to dispose of the stocks: should he do so he would be liable to his principal for the highest price the stocks may have attained during the time of the transactions.

APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

December 4, 1868.

OPINION OF THE COURT BY JUDGE PETERS:

From September, 1864, to March, 1865, inclusive of the months named, appellants were bankers and brokers doing business in the city of New York.

Appellee, being a dealer in gold and stocks to a large amount, made an arrangement with appellants to the following effect, as he states in his pleadings: That appellants were to buy stocks and gold for him as he should from time to time direct, they to advance what should be needed for that purpose, and to hold or carry the said stocks and gold for him, upon his keeping in their hands sufficient money or securities, as margin, to indemnify them against loss as they might from time to time require. They to sell said stocks, gold, &c., whenever he should direct sales to be made, and appellee was to allow them one-eighth of one per cent for purchasing, the same for selling, one-half per cent per month for carrying the stocks, &c., and interest at the rate of seven per cent per annum on the *advance* of the price of such purchases.

The contract as thus set out by appellee is denied by appellants, and there is no direct evidence of what the terms of agreement between the parties were.

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This action was originally brought by appellee against appellants to recover of them \$40,000, and \$37,500 the value of 500 shares of stock in the Quicksilver Mining Company, which money and shares of stock he alleges he advanced to them in the week preceding the 16th of March, 1865, as a confidential loan to be returned in a few days thereafter.

In the answer the loans are admitted, not however on the terms and upon the promise to return as alleged; and the whole transactions are set out in the answer between the parties and a balance is claimed by appellants after crediting appellee by the sums sued for, and a judgment asked over against appellee for said balance, for which purpose the same is pleaded as an off-set. Judgment was rendered for appellee for a very large amount, and to reverse it appellants have appealed.

It is not necessary to make a more particular statement of the very elaborate pleadings in the case, as the three of the most vital questions involved may be stated and disposed of without doing so. The *First* of which is, Were 1,900 shares of stock in the Quicksilver Mining Company bought by appellants for and on account of appellee, in addition to the 5,700 shares admitted to have been purchased by them?

Without undertaking an extended analysis of the volume of evidence on this question, it is enough to say that after a careful consideration of the whole evidence, we are constrained to the conclusion by a decided preponderance that the said 1,900 shares of said Quicksilver Mining Company stock were purchased by appellants for and on account of appellee, and that in making up the accounts between the parties, he must be charged with the cost thereof, if the evidence remains as it is presented by this record.

Second. Shall appellee be charged with commissions for purchases and sales and interest on the par value of the stock purchased and sold for him; or shall he be charged with interest and commissions on the actual costs and sale prices of said stock, &c.?

This question is rendered embarrassing from the fact that the parties in their pleadings do not agree upon what were the terms of their contract, and there is no evidence, either written or oral, showing what were the precise terms of their agreement, and in the absence of proof of a specific contract, the court must assume that the parties contracted with reference to the usage amongst brokers, and their customers, in relation to such transactions, if in

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fact a uniform custom on the subject be established, and the same be known to the parties to exist at the time. It is in evidence that appellee had been engaged in the business of broker and banker himself in the city of New York, and the weight of the evidence conduces to the conclusion that the custom there was then to charge interest and commissions on the amount of the stock purchased, of which he may be presumed to have been informed. But it is not shown by the evidence that such interest and commissions are charged without regard to the advances made by the customers, or that they are not entitled to a deduction for the amount they may have advanced as margin, and a usage which would authorize or allow brokers or bankers to charge interest and commissions against their customers on the full nominal amount of stocks purchased, when they have in their own hands the funds of such customers to the amount of one-fourth or one-fifth of the total sum advanced, using in their business, is unreasonable and oppressive, and should not be recognized. If, therefore, appellee must be charged with interest and commissions on the nominal amounts, called in the pleadings the par value of the stocks purchased and sold, the amounts of his advances as margins must be first deducted, for it is in fact a part payment.

Third. On the subject of the sale of appellee's stock, the authoritatively settled doctrine on the subject, is that the broker is bound to obey strictly the orders of the customer or principal in relation to keeping or disposing of the stocks in his hands, and so long as the principal keeps up the margin, the broker is not authorized to dispose of the stock, and if he does so, he would be liable to his principal for a wrongful conversion at the highest price it may have attained from the time of the conversion to the bringing of the action. If, however, which seems to be the fact in this case, as the evidence is now presented, appellee failed to keep up his margin, and upon being informed that unless the additional required margin was advanced, the stock must be sold, and he consented to a sale, such sale would not amount to a conversion, and appellants would be chargeable with the price the stocks brought or were actually worth in the best market at the place and time of sale.

The gold account of appellee as made out and presented to him was palpably erroneous, as he was charged with the 7,600 shares of stock in the Quicksilver Mining Company he was entitled to

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the dividends declared on that number at 5 per cent in gold, and he was also entitled to the 5 per cent gold dividend on 1,677 shares of Quicksilver Mining Company stock, making the dividend on the whole number of shares on which as the evidence here presents the case amount to \$46,385 in gold, which amount according to the evidence appellants used by checking upon it in their business, and they should be charged with the value of the gold in currency at the time received by them, when it appears to have been worth \$204 $\frac{1}{4}$ in currency to \$100.

As to the sale and disposition of the Erie stock and the Mariposa stock, they will be governed according to the principles herein stated as applicable to the Quicksilver Mining Company stock, and appellee is entitled to an allowance for the dividend on the Erie stock.

As a new trial must be awarded, this court has endeavored in a condensed form to state the principles which seem to be applicable to the evidence, and should govern in any subsequent trial.

Wherefore, for the reasons herein stated, the judgment is reversed, and the cause is remanded with directions to award a new trial, and for further proceedings not inconsistent with this opinion.

Speed & Barr, Crawford, for appellants.

Caldwell, Thompson, for appellee.

A. SANFORD ET UX v. OWEN EDWARDS ET AL.**Wills—Devise of Lands—Construction of Wording of Will.**

A will which devises lands to Mrs. Edwards "and the heirs of her body forever," is held to create in the estate thus devised, a fee simple title.

Lands and Conveyances—Deeds by heirs, of an Expectancy.

A sale of an expectancy, unassailable as fraudulent conveyances, to one, under the supposition that their mother had only a life interest in property devised her by her husband, will be confirmed, and the title subsequently acquired by the grantors, from their mother, will inure to the benefit of their vendee so as to vest a legal title in him.

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APPEAL FROM FLEMING CIRCUIT COURT.

December 12, 1868.

OPINION OF THE COURT BY JUDGE HARDIN :

Joseph Edwards died in July, 1860, and his wife, Matilda Edwards, died in February, 1862. They were possessed of an estate in land, slaves and personalty, including 96 acres of land acquired under the will of Mrs. Edwards' father, James McIlhenny, and slaves also derived in her right.

On the 15th of October, 1860, Owen Edwards, one of the children, assuming that his mother had but a life estate in the land and her children the remainder, sold and conveyed his supposed interest to John D. Secrest, and on the 26th of March, 1860, Thomas M. Edwards made a like sale and conveyance, to Secrest.

Sanford and his wife, late Edwards, brought this suit seeking to set up a deed from Joseph Edwards to them for a slave woman named Huldah, and a provision of \$1,000 made by J. Edwards to them ; also to charge the several distributees with advancements, and settle the estates of said decedents and for a partition among the heirs. And said Sanford setting up claims against Thomas M. Edwards and Owen Edwards, and alleging that their deeds to Secrest passed no title to him, sought to subject said interest to his claims.

Others of the heirs, by their answers and cross-pleadings, assailed said deed and provision, made by Joseph Edwards, in favor of Sanford and wife as fraudulent and obtained from Edwards when he was incompetent to make them.

The court adjudged, in substance,

1. That Joseph Edwards had capacity to execute the deed and bill of sale to Mrs. Sanford, and the provision so made for her was valid.
2. That James McIlhenny's will vested in Matilda Edwards a fee simple title in the land.
3. That the conveyance of Thomas M. and Owen Edwards to Secrest be sustained.

Sanford and wife complain of the judgment in so far as it

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sustains the conveyances to Secrest; and the other distributees of the estate seek a reversal so far as the judgment sustains the provision made for Mrs. Sanford by Joseph Edwards.

Although the business capacity of Joseph Edwards seems to have been much impaired by habits of dissipation, to which he was unfortunately addicted, he does not appear to have been a lunatic or imbecile, and the evidence, we think, sustains the conclusion of the court below that he had sufficient capacity to make the provision and bill of sale to Mrs. Sanford and that they were valid.

We also concur with the circuit court in its construction of the will of James McIlhenny, which devised the land to Mrs. Edwards "and the heirs of her body forever."

The estate thus devised was properly construed to be a fee simple title, according to the decisions of this court in *Johnson vs. Johnson* (2 Met., 331) and *Lane vs. Nichols* (2 Duvall, 447).

We are further of the opinion that although the title attempted to be conveyed by Thomas M. Edwards and Owen Edwards to Secrest did not vest in them till after the date of their deeds, as these conveyances seem not to have been assailable as fraudulent conveyances under the statute, and contained covenants of general warranty, the title subsequently acquired by the grantors inured to the benefit of Secrest, so as by operation of law to vest the legal title in him. (*Logan vs. Steele's heirs*, 4 Mon., 430; *Logan vs. Moore*, 7 Dana, 76; *Dickinson's heirs, &c., vs. Taylor's Exors., &c.*, 14 B. Monroe, 60.)

Wherefore, perceiving no error in the judgment to the prejudice of either party complaining, the same is affirmed.

Cord, for appellants.

Weis, for appellees.

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CHARLES L. HARRISON, TRUSTEE ET AL v. G. SCHLUDER ET AL.

Fixtures—Landlord and Tenant.

A claim of a tenant to have buildings, put upon the leased premises for his convenience and for the purpose of trade, considered as personal property, is to be considered with the greatest latitude and indulgence. And is held, that the Circuit Court did not err in so considering the claim of appellee.

APPEAL FROM JEFFERSON CIRCUIT COURT.

December 5, 1868.

OPINION OF THE COURT BY JUDGE PETERS:

In Johnson's Exr. vs. Wiseman's Exr. 4 Met. 357, this court said questions respecting the right to what are called fixtures arise between three classes of persons:

1. Between heir and executor, and there the rule obtains with most rigor in favor of the inheritance; and against the right to consider as a personal chattel anything which has been affixed to the freehold.
2. Between the executor of a tenant for life and the remainderman, or reversioner, and here the right to fixtures is considered more favorably to executors.
3. Between landlord and tenant; and here the claim to have articles considered as personal property is received with the greatest latitude and indulgence.
4. There is still an exception of a broader character in respect to fixtures erected for the purposes of trade.

The controversy in this case is between the tenant and the vendee of the landlord who occupies the place of landlord, and the rule is between such that a claim of the tenant to have buildings put on the leased premises for his convenience, and for the purposes of trade, considered as personal property, is to be considered with the greatest latitude and indulgence. And applying this rule to the present case there appears to be no error in the judgment of the court below. And the same is therefore *affirmed*.

Gibson & Fox, for appellant.

Dembitz, for appellee.

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E. FEBRENBACKE v. A. STRAUS ET AL.**Pleading—Sufficiency of Allegations in Petition.**

A petition for an injunction against the enforcement of a judgment obtained by default, which shows that plaintiff was negligent in answering a former suit and allowed judgment to go against him, examined and held insufficient as a defense, either at law or equity.

Estoppel—Sale of Property—Power of Attorney.

A sale of property by one holding a power of attorney, though voidable on the ground of fraud by the vendor, is binding on him who makes the sale under the power of attorney, where it is shown that the sale was made, upon the agreement that the property was to be re-deeded to him.

Injunction—When not Maintainable.

Injunction is not maintainable to withhold enforcement of a judgment obtained by default, after process duly served, and the suit ignored by defendant.

APPEAL FROM LOUISVILLE CHANCERY COURT.

September 29, 1868.

This was an action in equity by appellant, to annul a judgment at law obtained by appellee, upon which an injunction was obtained upon the following facts: That appellee having been indicted in the city court of Louisville, fled to Canada to avoid arrest, and while there, sent a power of attorney to appellant to transact all business for him, sell his land, etc., and his wife, coming back to Louisville, saw appellant, and they had some understanding about the sale of the house and lot owned then by said Straus. Appellee was surety on a bond in default to the city of Louisville for \$800. Appellant, under the power of attorney, sold the land of Strauss, to his brother, Carl Febrenbacke, with the understanding that the land was to be re-deeded to him. Some six years thereafter Strauss returned and demanded payment for the property, of \$1,000 less \$175 paid, and on refusal by appellant to make settlement, brought an action at law for \$810 balance due. Appellant was duly summoned, but did not appear to defend, and a default judgment was taken against him. The sheriff, with an execution,

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vent to him, and advised settlement, or he would be compelled to foreclose on him. Accordingly, other property, belonging individually to appellant, was levied on and sold by the sheriff, for \$1,005, and just before the sale was confirmed, appellant filed said petition seeking to vacate the judgment and sale, alleging all the facts above recited, except as to the agreed sale price of the land which he stated was \$535, and insisted in his petition that although the subpoena was served on him, he did not know what it was, and did not know anything about the whole suit until the purchaser at the execution sale came to demand possession of his house. He also alleges that he had tried to make settlement with Strauss, if he would pay off or discharge the bond in default, \$800, and had been waiting for that to be done. On final hearing, the appellee presented a deed to the court to his house and lot, and the chancellor accepted same, ordered it delivered to appellant, dismissed the injunction with costs and damages, and appellant appeals.

OPINION OF THE COURT BY JUDGE ROBERTSON:

The matter set up in the petition was insufficient as a defense, either at law or in equity. The pretended sale of the appellee's house, though voidable by him, is binding on the appellant by estoppel. And there being no doubt that, as to title, the appellant is the only beneficial party, he is undoubtedly liable for rent or interest.

The injunction was not maintainable even if the matter alleged had been available in the proper mode and at the proper time. No good reason for suffering judgment by default has been shown. The matter ought to have been pleaded as a defense to the action and is not therefore now cognisable in equity.

The injunction was, therefore, properly dissolved. And we perceive no error in the judgment. The ostensible vendee of appellee's house was a party, and the house sold under execution was not the same, and thus all parties interested are concluded.

Wherefore, the judgment is affirmed.

L. A. Wood, for appellee.

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F. THOMPSON v. D. REED.

Evidence—Facts as to wrongful Conversion of Property—Demurrer.

Facts in a petition as to money alleged to have been coerced from the plaintiff and which may be denied by the answer, are questions for the consideration of the jury; and a demurrer to the petition should have been over-ruled.

Threats—Money Obtained by Co-ercion—Demurrer—Actions.

Money obtained from a plaintiff by threats to have his son arrested for an alleged offence, is a proper ground of action for recovery, and it is error to sustain a demurrer thereto.

Tort—Actions for Recovery Under.

To render a defendant liable for the conduct of others in an action for the wrongful taking of property, it must be shown that there was an active participation in the taking, or that he advised and counselled therein.

APPEAL FROM MARSHALL CIRCUIT COURT.

October 19, 1868.

OPINION OF THE COURT BY JUDGE PETERS:

The appellant alleges in the petition that when appellee's horse was taken, those who took him left a horse worth, then seventy-five dollars in possession of appellee which he disposed of, and converted to his own use; this allegation is admitted by the demurrer, and if true all that he could be legally entitled to, even if appellant's son was responsible for the taking, would be the difference between the value of his horse when taken, and of the one left with, and converted by him, and all that he demanded and received over and above that difference, he is in conscience and law, bound to return.

Moreover, if the son of appellant did not actively participate in the taking of appellee's horse, or advise, and counsel the taking of him, he could not be made responsible for the conduct of those who took him; and the money for the price of the horse coerced from appellant by threats of arrest, and imprisonment of the son, should be returned, and as these were facts, which should have been

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submitted to a jury, if denied and the issues properly made up by the pleadings, it was erroneous to sustain the demurer to the petition. Wherefore, the judgment is reversed and the cause remanded with directions to overrule the demurrer to the petition, and for further proceedings consistent herewith.

Palmer, for appellant.

Gilbert, for appellee.

N. S. ANDERSON ET AL v. JOHN GLENN.**Sales—Failure to Advertise as Required in the Judgment.**

A failure to advertise land for sale as required by the judgment on sale, is error in that it may prevent competition by reason of the time and place not being known.

Conveyance to Prefer Creditors—Failure to File Suit in Time.

In order that a mortgage, alleged to have been given to prefer creditors, may be attacked, action must be commenced within the time required by 1 v. R. S. page 553 by some creditor.

APPEAL FROM DAVIESS CIRCUIT COURT.

October 9, 1868.

OPINION OF THE COURT BY JUDGE PETERS:

It is shown by the weight of evidence that the sale of the land was not advertised as required in the judgment, and the sum bid for it was not more than one-fourth of its value; the under value at which it was bid off may be accounted for, on the ground that the time and place of the sale were not known, and competition prevented thereby; the court, therefore, correctly set aside the sale on exceptions filed by appellee before the same had been confirmed.

By the mortgage of Travis to Glenn, the latter was invested with the title to the land subject to the lien of Murphy acquired by his attachment. That mortgage was made ten months prior to the appellant's petition, and even if it had been made to prefer Glenn to other creditors, no petition had been filed by a creditor

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within the time prescribed by the act of 1856 *1 V. R. S. p. 553*, to bring it within the operation of that statute. Consequently Glenn's right to be indemnified out of the land after Murphy was paid was superior to all other claims. Glenn had an interest in the matters in litigation in the action of Murphy vs. Travis, and if not made a party by the plaintiff in that action, he had a right to come in by petition, and if the court had refused to order him to be made a party it would have been an error available for reversal in this court.

Wherefore, the judgment is *affirmed*.

Sweeney & Stuart, for appellant.

Ray & Hardin, for appellee.

ELIZ N. ARNOLD ET AL. v. JOHN BREHMER ET AL.

Dower—Right to Collect Rents on Mansion House until Dower Assigned.

Though the rents from a deceased estate including the mansion house, may amount to more than the wife's one-third of the rental value of the whole estate, she cannot be deprived of the rents to her exclusively from the mansion house, since she is entitled to hold that and curtilage without charge until her dower may be assigned her.

APPEAL FROM HARDIN CIRCUIT COURT.

October 16, 1868.

OPINION OF THE COURT BY JUDGE HARDIN:

It does not appear from the averments of the petition that Mrs. McBurnett was not entitled to all the rent of the store house occupied by Garam & Co. in her right as widow of W. D. Arnold, her dower not having been assigned; and there being a farm of about 227 acres of land belonging to the estate as well as the store house rented to Garam & Co. and the dwelling occupied by McBurnett and wife. The allegation that the rental value of the dwelling house was more than one-third of the rental value of the whole estate may be true and yet Mrs. McBurnett may have been

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entitled to collect and retain the rents of the store house until dower should be assigned her, as by the 9th section of Article 4 of Chapter 47 of the Revised Statutes (2nd Vol., 26), she was entitled to hold the mansion house and curtilage without charge therefor until the allotment of her dower.

It seems to us the court properly sustained the defendant's demurrer to the petition and dissolved the injunction, and as the plaintiffs would not plead further, the action was rightly dismissed.

Wherefore the judgment is affirmed.

Brown & Murray, for appellants.

Wilson, for appellees.

THOMAS WELLER v. THOMAS J. PERRY.

Deeds—Mistake in Drafting—Intention of Donor.

A father intending to divide all his lands to his children, instructed his draftsman, to make out deeds to each of his daughters. Only one of the deeds was read over to him before signing all. Afterwards it was discovered that one of the deeds was made to the husband of one of the daughters and this only shortly before her death. The property was recognized by the husband, as belonging to his wife, during her life: Held to be such a mistake as will authorize the court to cancel the deed to the husband.

APPEAL FROM HARDIN CIRCUIT COURT.

October 15, 1868.

OPINION OF THE COURT BY JUDGE WILLIAMS:

It is very clear that the appellant intended and thought he had conveyed the 147 acres of land to his daughter Catherine Perry, wife of the appellee, he instructed the draftsman to draw the deed to his daughter so they would have the land and right to control it but that through the hurry and inadvertance this deed was made to the husband.

The father being old, infirm and indisposed desired to divide his lands among his children and had it partitioned by actual

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surveys for that purpose, the other deeds, made at the same time and for the same reasons, are made to the daughters and not their husbands, only one deed was read to him; when supposing all to be alike, which was really intended by the draftsman, he signed and acknowledged all; there is no proven or perceptible reason why this one should have been intentionally made to the husband.

The recognition of the husband during his wife's life that the deed was erroneously made to him instead of his wife through mistake fortifies the evidence of the draftsman that such was his instruction and intention beside the intrinsic probabilities strongly indicate the same thing.

As the wife lived only about a year after the making of the deed no fatal presumption arises from a delay to bring this suit until a short time after her death inasmuch as the donor did not know of the mistake until just before, or about the time of her decease, and even if he had sooner discovered it his ill health would explain this short delay. It is well settled as heretofore decided in various cases by this and other courts that deeds as well as other written agreements may be reformed for fraud or mistake and the mistake clearly appearing in this case the deed should be reformed.

Wherefore, the judgment dismissing the petition is reversed with directions for further proceedings consistent herewith.

Cofer, for appellant.

Read, for appellee.

M. HARDIN'S EXR. ET AL. v. JOSH. WILLIS ET AL.

Executors and Administrators—Charges and Credits in Accounting and Settlement.

It is error to charge against the whole assets of an estate, amounts enjoined by particular distributees. Such items should be included in the particular shares interest, but not in the general assets, thereby reducing the proportionate amount due those not concerned in the litigation.

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OPINION OF THE COURT BY JUDGE WILLIAMS:

George Smith died intestate leaving four brothers and sisters and their descendants as his heirs and distributees, Mrs. Hardin, wife of M. Hardin, deceased, being a sister.

The slaves of the estate were sold and Willis as receiver settled with M. Hardin for his share as witnessed by his receipt of October 25, 1848, for \$453, in full, so that the proceeds of the negroes need not be further noticed in this decision.

The matters having been litigated as between the heirs were referred to a commissioner who reported

Assets in hands of administrator consisting of various items to	\$5,333.29
From which it seems there should be deducted the second item being "amt. perpetuated on injunction by decree July 22, 1846, in case of Turner Smith vs. Willis	\$275.21
Int. to March 22, 1856	150.07— 434.28

Leaving\$4,899.01

It may have been right to charge Turner Smith with the amount of his perpetual injunction against Willis, but it was improper to charge it as part of the assets in Willis' hands.

The administrator, however, is only charged with three-fourths of the replevin bond for land as Turner Smith one-fourth was "scaled off;" the amount of the three-fourths of this bond is reported

by the commissioner at	\$1,170.00
Add the remaining $\frac{1}{8}$ for T. Smith..	390.00

would make the bond	\$1,560.00
which when added to the other assets makes the estate	\$6,459.00
From which deduct the administrator's proper credits. 1st, for fee bills, &c., on the land litigation on said replevin bond	\$94.45
2d. Interest on 2-3 of the amount or replevin bond retained 4 months	\$14.35
3d., F Vouchers from Nos. 1 to 21 ...	\$667.68

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4, For commission allowed on \$3597.82 \$79.89

5, Allowance for other services in the litigation of the estate\$350.00

Making\$1,206.37

And leaves for distribution\$5,252.63

M. Hardin's 1-4 of which is 1,313.16

To be credited by his receipt as follows:

1 dated Oct. 18, 1852, for\$546.11

Int. to March 10, 1856 111.04

2 dated April 17, 1855 257.06

Int. to same time 13.85

3 dated Oct 18, 1853 12.50

Int. to same time 2.54

4 dated Nov. 22, 1855 300.00

Int. to same time 5.40

Making\$1,249.50

leaving a remainder of\$63.66

due after deducting M. Hardin's receipts.

It may have been right to have charged the proper shares with the sums enjoined by Crawford and McKitrick, but it was palpably erroneous to charge these against the general assets and thereby reduce the shares of those not concerned in the injunctions.

Only Hardin's executor and Head, who represents his deceased mother, Mrs. Hardin, and who survived her husband, M. Hardin, deceased, have appealed, therefore no other rights are settled. So far from a judgment against Hardin's executors and Head being right there should have been one in their favor for \$63.66.

Wherefore, the judgment is reversed with directions to render a judgment for Head of \$63.66 with interest from the date of the commissioner's report.

Judge Hardin did not sit in this case.

Harlan, for appellants.

James, for appellees.

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R. A. MOTHERAL v. S. MOTHERAL ET AL.

Lands and Conveyances—Joint Owners.

The preponderance of evidence as to a purchase of lands by joint owners, though the deed be taken in the name of one, held to be sufficient to adjudge against an estate a reconveyance of one half to the surviving brother.

APPEAL FROM GRAVES CIRCUIT COURT.

October 16, 1868.

OPINION OF THE COURT BY JUDGE PETERS:

Prior to the adoption of the Revised Statutes, Wade conveyed a fraction less than a quarter section of land in Graves county to J. F. Motheral, and Wortham conveyed a half quarter section in the same county to him, the consideration for the first named tract was \$150, and of the other \$100, as recited in the deeds.

The grantee in said deeds died in the fall of 1862, intestate, and this action was instituted by Robert A. Motheral, his brother, in May, 1863, against his widow and heirs, alleging that he paid one-half the purchase money for said tract of land to the vendors; that he was a joint purchaser with his brother to whom the conveyances were made, that a trust resulted to him for so much as he paid for; and seeks by his action to have a conveyance made to him therefor.

He filed as evidence of his claim with an amended petition a writing executed by the intestate in the following language:

"I have the west half of the *Waid* land, Robert the east half, Robert has the north half of the *Wortham* land, and I the south half. Feb. the 25th, 1852.

"J. F. MOTHERAL."

In addition to that evidence, it is proved that a large portion of the price paid for the land was borrowed of Mrs. Cook, that James F. and appellant executed their joint note to her therefor, and there is evidence that appellant paid one-half thereof; that he paid a mare also towards the price, and that his brother owed him on the exchange of horses \$25.

Quisenberry, who purchased the half of the *Wade* land, which

Opinion of the Court.

decedent claimed, and wished to buy the whole tract; and decedent informed him he could not sell it to him, as he had received a letter from appellant, who was then in Missouri, informing him he was not pleased there, and intended to return, and did not wish to sell his part of the land, and when he went to get his title bond for the west half of said quarter section he met with appellant at James F. Motheral, and he remarked to him, "there is the man, alluding to Robert," from whom he could buy the east half; and that James F. Motheral told him that his brother and himself had agreed upon a dividing line between them, and showed him the line, telling him at the same time, that they had not made the fence between them on that line because timber was scarce, and it was too far off to haul it.

Other witnesses prove that they have divided the land, each one occupying on his own side of the conventional line, and it is also in evidence that appellant listed the part of said land claimed by him with the assessor for taxation, and paid the taxes on it during the life of his brother, and afterwards.

Appellant's claim is further fortified by other facts proved, but as a recital of all of them would extend this opinion to an unnecessary length, a passing notice of some of the most prominent of them must suffice.

These brothers were partners in trading before this purchase, and as their father proves went together to purchase the land of Wortham, and purchased it, and divided it. One witness proved that after decedent sold, he said he did not know, that he would have left the barrens if he had owned all the land, and Wortham proved he sold the land he owned to them jointly.

There is some evidence on the other side slightly conflicting, but when all the evidence is considered, there cannot be a rational doubt that these brothers purchased both these tracts jointly, and for some reason unexplained, the conveyances were made to James F. Motheral, and that he held one half the land for appellant, who paid certainly a portion, if not a full half, of the purchase money, and is entitled to a conveyance to the one-half of both parcels of land conveyed to James F. Motheral, the one by Wade, and the other by Wortham.

Wherefore, the judgment is reversed, and the cause remanded, with directions to order a conveyance of the land to appellant according to the partition of them, made by the parties; but as it

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is not very certainly shown that the full half of the purchase price of the land has been paid by appellant, the case should be referred to the master to ascertain and report how the accounts of payments stand, and if any of the purchase money is due from appellant to the representatives of James F. Motheral, deceased, he should be adjudged to pay the same, and for which they should have a lien on the land.

Anderson, for appellant.

MOSES STONE & F. H. SKINNER v. M. M. LYON ET AL.**Mortgages—Failure of Mortgagee to Assert Mortgage.**

The failure of a mortgagee to assert his claim for many years, while the property is still in the hands of his principal who thereby could use same for the purpose of inducing others to become his surety, or to disclose his lien when the property is being disposed of, are cogent circumstances against the justness of his claim.

Claim—Personal Property—Estoppel.

A failure to disclose a lien on personal property for many years after a sale thereof by the mortgagor, and with the knowledge of the mortgage, held to be such negligence as to operate as an estoppel against the claim.

Mortgages—Sale of Property with Actual Notice.

A mortgagee who knowingly permits and sanctions the sale of lands embraced in his mortgage, and allowed the purchaser to occupy same adversely to his claim for a period of years before he discloses his claim, is debarred from asserting his claim under the mortgage, against the purchasers of the property.

APPEAL FROM LYON CIRCUIT COURT.

December 11, 1868.

OPINION OF THE COURT BY JUDGE HARDIN :

On the 29th day of April, 1852, M. M. Lyon gave his note to F. H. Skinner for \$2,434, payable one day thereafter, and as security for the debt Lyon, at the same time, executed a mortgage to

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Skinner of a tract of about 412 acres of land and some slaves, the condition of the mortgage requiring payment of the debt within twelve months from its date.

The mortgage was recorded in Caldwell county in which Lyon, who retained possession of the property, resided and the land was situated. But afterwards the new county of Lyon was formed including the land and residence of the mortgagor.

Some time after the execution of the mortgage Lyon entered into an executory contract for a sale of the land to N B. Frasier, and gave bond for a conveyance and put him in possession, and Frasier after occupying the land for a time, transferred his purchase to his son-in-law Moses Stone, to whom Lyon made an absolute conveyance of the land on the 29th of December, 1857, for the expressed consideration of \$2,500.

Lyon was afterwards the sheriff of Lyon county and failed to pay into the treasury of the State the revenues collected by him for the years 1858 and 1859, and the Commonwealth recovered judgment therefor against him and his sureties in his official bond. On these judgments executions were issued and levied on the slaves of Lyon in 1861, and the property being sold by the sheriff J. H. Roe became the purchaser of part of the slaves, and the appellees Braswell and Cobb became the purchasers of the others.

In April, 1863, Skinner brought this suit in equity against said Lyon, Roe, Braswell, Cobb and Stone seeking a foreclosure of his mortgage, and to subject the land to sale in the hands of Stone, and the slaves in the hands of said Roe, Braswell and Cobb. He subsequently filed an amended petition alleging that Braswell and Cobb had caused the sale to be made by the sheriff by executing a bond of indemnity to the sheriff and that they were liable for a wrongful conversion of the slaves to their use.

Stone answered the petition claiming to be an innocent purchaser of the land without notice of the plaintiff's claim and alleging that the sale and conveyance were made by Lyon with the knowledge and assent of Skinner, who was estopped thereby. He also charged that the claim of Skinner had been satisfied.

The purchasers of the slaves also resisted any recovery against them on the grounds that their purchase was legal and at least, substituted them to the rights of the mortgagor, who had never been required to relinquish the possession of the slaves till the late war operated to free them; they moreover controverted the plain-

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tiff's claim as having been discharged and on the ground that it was barred by limitation.

The court dismissed the action as to Roe, Cobb and Braswell, but adjudged a foreclosure of the mortgage on the land, and both Skinner and Stone seek a reversal of the judgment in this court.

Several facts and circumstances disclosed in the record reflect suspicion on the claim of Skinner as well as conduce to the conclusion that, if his debt and mortgage were valid originally, most of his debt had been satisfied before the defalcation of Lyon as sheriff.

Young, the sheriff, proves that while he had in his hand the executions against Lyon and his sureties, for unpaid revenue Skinner told him, on being informed of the executions, that Lyon "owed him some but that he should not trouble him about it." His failure to sue or assert claim to the mortgage property for many years, while the possession of it must have given Lyon credit and operated to induce others to become his sureties—his failure either to disclose or assert his claim when Lyon sold the land to Frasier and put him in possession or even afterwards till it was conveyed to Stone, and when in this litigation his debt and mortgage were assailed as fraudulent and unjust, his failure to take the deposition of Lyon or any evidence to sustain his claim, are all cogent circumstances against the justness of his claim.

But in our opinion, such a state of fact is disclosed as should estop Skinner from setting up his mortgage against either Stone or the execution purchasers.

In addition the facts already referred to, it is sufficiently proved that he had actual knowledge of the sale of the land to Frasier and assented to it and permitted the land to be held and occupied adversely to his claim for near five years, and a portion of the purchase money to be paid, a part of which he received himself, before he disclosed the existence of his debt and mortgage or asserted his claim as mortgagee.

On the whole, we think the conclusion is fully authorized that he knowingly permitted and sanctioned the sale of the land, and that equity should debar him from enforcing his mortgage on the land against the claim of the purchasers who, with apparent approval of Skinner, bought and paid for the land.

For the reasons we have indicated it seems to us the court erred in adjudging a foreclosure of the mortgage on the land; but for the same and other reasons we concur in the judgment as to the purchasers of the slaves.

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Wherefore, the judgment is affirmed on the appeal of Skinner, but on the appeal of Stone it is reversed, and the cause remanded with directions to dismiss the petition as to him.

Campbell, Wake, Dabney, for appellants.

James, Marble, for appellees.

GEO. WORK ET AL V. J. M. DORSEY ET AL.

Pleadings—Parties to Suit.

In a suit to enforce a specific conveyance, for a division of property ordered by a judgment of court, it is proper to join as parties defendant, all persons in possession of the land, by pretended purchase or otherwise.

APPEAL FROM OHIO CIRCUIT COURT.

December 11, 1868.

OPINION OF THE COURT BY JUDGE HARDIN:

In 1833 Silas Dexter appears to have been in the occupancy of a tract of land embraced by a patent from the Commonwealth of Virginia to John Dorsey for 12,000 acres of land, dated in 1787, and which was claimed by the heirs of Samuel Work as being also covered by a patent of Ignatious Pigman for 9,000 acres under which they claimed, dated in 1797, and an action of ejectment was brought by Work's heirs against Dexter for the recovery of the land.

Archibald Dorsey being admitted to defend the action it progressed until the 3rd day of October, 1838, when an agreement was entered into by the plaintiffs, the heirs of Work and Archibald Dorsey and Alexander Dorsey, by Philip Triplitt, their attorney, by which a judgment was to be rendered in favor of Work's heirs for the land in dispute, and the same should then be divided between the parties claiming under the conflicting titles of Work and Dorsey, according to terms agreed to by the parties, and a judgment was rendered and the division made by commissioners accordingly.

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On the 6th day of April, 1850, John M. Dorsey and others, the children and heirs of said Archibald Dorsey, who had died, and said Alexander Dorsey brought a suit in chancery against the heirs of Work, and others, the complainants alleging that the title of John Dorsey was vested in his son, Thomas Dorsey, by deed, and by the will of the latter it was devised to his widow, Mrs. Elizabeth Dorsey the mother of said Archibald Dorsey and grand-mother of said Alexander Dorsey, the only child of her deceased son, Theodore Dorsey. The bill represented that said Alexander owned 1-7 of the land in controversy and that said Archibald's heirs owned 3-7 of it as follows, viz. 1-7 in his right as one of the children of said Thomas and Elizabeth Dorsey, and the shares of his sister Matilda Sullivan and his brother Nicholas Dorsey by purchase, and that the remaining three sevenths of the title was vested in three other children of said Thomas and Elizabeth Dorsey or their descendants, viz. Elizabeth Dorsey who intermarried with Benjamin Berry, Mary Dorsey who intermarried with Samuel Norwood, and Harriet Dorsey who intermarried with John W. Berry.

The object of this suit seems mainly to have been to compel Work's heirs to abide by and perform said agreement of compromise.

The case was heard in October, 1855, as between the plaintiffs and Mrs. Nancy Barnard who claimed part of the land by purchase from part of Work's heirs and was decided in favor of Mrs. Barnard.

And the residue of the cause having been continued on the docket until April, 1859, was then tried, and the court adjudged a conveyance from Work's heirs to the plaintiffs.

Afterwards in October, 1859, on the motion of the plaintiffs an amended petition was filed, making additional parties plaintiffs and defendants. In this amended petition a modification of the former decree was asked on the ground that many of the parties on both sides were dead at the time it was rendered. The plaintiffs further alleged that George Brown, John Withrow and some fifteen others of the newly made defendants were in possession of the land without right and asked in addition to the relief sought in the original bill that said defendants be required to surrender the possession and also that they be enjoined from committing waste upon the land.

A final judgment was rendered against the parties in possession

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of the land, in September, 1866, and they have brought the case to this court.

Various irregularities and errors are suggested as grounds of reversal, which have been considered and are deemed unavailing to the appellants. It seems to us to have been proper to make them parties to the suit against Work's heirs, to quiet and perfect the plaintiffs' title, that their own claims might be litigated which was done, and as it does not appear that either of them stood in a position to successfully resist the claim which the plaintiffs had a right to assert against them under the titles of Dorsey's and Work's heirs united, the court rightly adjudged a recovery against them.

Wherefore the judgment is affirmed.

McHenry, for appellants.

Rodman, Kincheloe, for appellees.

TAYLOR & NEWBY v. CHARLES S. TURNER.

C. S. TURNER v. TAYLOR & NEWBY.

Fraudulent Conveyance—Purchase of Property in Name of One for Benefit of Another.

Taylor purchased of Montgomery land, for which he executed his notes. A part payment was made of \$85 by delivery to Montgomery of a horse belonging to Land, and afterward Land moved onto the property. Other payments were made, by Taylor borrowing money from other parties and executing his note therefor. Taylor and Land both claimed the purchase made for Land. Held that the property would be liable for the debts of Taylor.

APPEAL FROM MADISON CIRCUIT COURT.

December 14, 1868.

OPINION OF THE COURT BY JUDGE WILLIAMS:

This suit was originally begun by C. S. Turner's statutory guardian, but he having arrived at majority, prosecuted it in his own name, against Taylor and Newby and others to set aside convey-

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ances alleged to be fraudulent and to subject the property to his debt of some \$2,520 on Taylor et al. The court adjudged the sale fraudulent as to two negro girls, but dismissed the petition as to a negro man and two tracts of land, from which both parties have appealed on the same record.

Taylor and Newby were brothers-in-law and lived within a few hundred yards of each other on adjoining farms. At the time of the pretended sale of the negroes there was no ostensible change of possession, the pretended hiring, by Newby, of the negroes to Taylor, the vendor, could not admonish creditors or purchasers of such sale.

Taylor was then in embarrassed circumstances, this debt had been reduced to judgment, at least when the bill of sale bears date, one execution had been issued and stayed for some considerable time, another had gone to the sheriff's hand, the fact that the officer then found the negro man in Newby's possession makes no substantial distinction as to him and the other negroes who still remained in Taylor's possession. The purchases set up in Newby's and Taylor's answers was made in August, the bill of sale bears date the following February, the list of taxable property is of January 10th, shows that both listed the same number of slaves for previous years, no other sales or purchases are spoken of in either the pleadings or proof, no ostensible change of possession was made until after February.

The tract of land claimed by Newby as having been purchased from Taylor and to be paid for by settling the purchase price with Wm. Taylor, the father of W. S. Taylor, on a note held on the latter, is too transparent to escape the scrutinizing gaze of the chancellor.

There is no proof that such a note existed, and if it did, it was probably given for property substantially an advancement and not to be paid until the old man's death, and then to be settled for in the distribution; the note is not exhibited, though called for by the adverse party, nor is Wm. Taylor's deposition taken, but even if the note existed, there is no proof that Newby ever paid anything on it, or that Wm. Taylor ever recognized, asserted, or even knew of this transaction.

The Clark Montgomery farm of 87 acres in Washington county is in no better condition.

W. S. Taylor purchased this land of Montgomery, took his title

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bond therefor and subsequently took the deed to himself; thus matters remained since the year 1855 down to the bringing this suit in January, 1863. Taylor paid on said land a mare at \$85 which belonged to Squire Land, and gave his own notes, one due the first of the following January, the other at a subsequent date, and Land rented the place out the first year to Taylor's relative, Taylor and himself then lived neighbors in Madison county and both desired to remove to Washington county, and Taylor had purchased a small farm within 1 1-4 miles of this one, Land removed to it the next year. The first payment was made by money borrowed, through the instrumentality of Talor, or Turner's guardian, and it was paid by Taylor, the subsequent payments were made with money borrowed from Stone and this note too was taken up by Taylor, he substituting his note with Newby and others as his security.

Both borrows were made mainly upon Taylor's credit and responsibility, and he paid the obligations.

Land, if not insolvent, was embarrassed and had but few resources; he continued to reside upon the place until he volunteered in the Federal army in 1862, when his wife sold his small personal property and removed with her relatives to Illinois.

Land then rented the farm out for the next year, but Taylor got the rent note.

It is evident that though Land began the negotiation for this farm and that it may have been the intention it should be his when he paid for it, yet he never did pay anything but the mare and had several years use of the place; the purchase being made by Taylor, in his own name, the title being conveyed to him and being upon record, and as Montgomery says, the title bond being surrendered to him through Taylor, and no proof of even an assignment of it to Land, renders this farm liable to Taylor's creditor.

Whilst there was a controversy of opinion as to the value of the slaves when levied upon and taken by Newby from the sheriff by executing bond, yet we do not feel authorized to disturb the values as fixed by the commissioner, as perhaps all the facts detailed by the evidence sustain such valuation.

Wherefore, said judgment is affirmed on the appeal of Taylor and Newby, and reversed on the appeal of Turner, with directions to the court below to subject the value of the negro man and the farm, claimed by Newby as being purchased from Taylor; also

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to subject the Clark Montgomery farm in Washington county claimed by Land to the judgment of Turner.

Burnam, for Taylor, &c.

Turner, for Turner.

CATHERINE SPEARMAN ET AL V. JOHN R. PAGE ET AL.

Fraudulent Conveyance—Participation by Vendees.

In the absence of proof of knowledge of or participation in a conveyance of land by a defendant, by the vendees, held, not to constitute a fraud upon any creditor, especially where no proof is offered as to the insolvency of the defendant at the time of the transfer.

APPEAL FROM CLINTON CIRCUIT COURT.

December 15, 1868.

OPINION OF THE COURT BY JUDGE ROBERTSON:

Waiving the want of legal service on the infants which was not cured by the irregular appointment and answer of a guardian *ad litem*, the judgment must be reversed on the merits.

There is no proof of Kitty Gabbard's insolvency when she conveyed the land to Mrs. Spearman and her two infant children.

Desirous to sell before her removal, she offered the land to Luttrell, who refused to buy, at the same price given afterwards by Mrs. Spearman who paid the consideration of \$100 when the conveyance was made. We cannot therefore see sufficient evidence of an intent by Kitty Gabbard to defraud any creditor imputed to her in the petition, and denied in the answers. But even if she was actuated by such motive there is no proof of a knowledge of it, or any participation in it by the vendees.

Wherefore the judgment for selling the land conveyed is reversed, and the cause remanded with instructions to dismiss the petition against the appellants.

Winfrey, for appellants.

ELIZABETH THORNTON ET AL v. THOS. PEACOCK ET AL.**Descent and Distribution—Life Estate—Remainder.**

A remainder interest in a life estate, is subject to sale under an execution, and an absolute deed therefor may be made.

Same—Remainder.

The father of the remaindermen, having purchased their interest at execution sale his note, given therefor is subject to be paid out of the deceased estate. But this will not affect the life estate of the wife in the land and she cannot be estopped from asserting her tenancy to the tract.

APPEAL FROM GARRARD CIRCUIT COURT.

December 18, 1868.

OPINION OF THE COURT BY JUDGE WILLIAMS:

By the will of her deceased father, Elizabeth Thornton had a life estate in the 90 acres of land remainder to her children.

This remainder interest was subject to sale under execution, therefore, by virtue of the execution sales of the interest of Jno. M. Thornton and Wm. Thornton, two of her sons, their interest, by deeds, &c., passed to their father, John Thornton, who executed the note sued on for such interest, and this being a part of his estate, when he died was subject to be sold to pay said note.

But it was erroneous to sell it absolutely as a present, possessed, fee simple estate, disregarding Elizabeth Thornton's life interest. She is not estopped by anything in the suit with Lowe from now asserting her tenancy for life to the entire 90 acres of land.

For this error alone, the judgment is reversed, with directions for further proceedings consistent herewith.

Anderson, for appellants.

McKee, for appellees.

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W. G. REDMAN V. JOHN B. HART, ADMR., ET AL.

Contracts—Covenants—Specific Execution.

An covenant by several obligors to pay certain debts out of any church funds that may come into their hands, will render them personally liable for a breach thereof, where such funds were proven to have been received by them.

APPEAL FROM HENDERSON CIRCUIT COURT.

December 23, 1868.

OPINION OF THE COURT BY JUDGE ROBERTSON:

Although the obligors were not at all worthy to be personally liable for the debt acknowledged by them for the church, yet their covenant to pay out of any church funds which might come to their hands, made them personally liable for a breach of it by non-payment out of such funds, if they came to their hands. The petition alleges that such funds, exceeding the amount of the note, did come to their hands and that, nevertheless, they failed to pay as promised. The co-obligor, Riedy, denied that charge, and a jury found against him, and we presume rightfully, as he acquiesced in the verdict and did not spread the evidence on the record.

The appellant, Redman, by failing to answer, admitted the allegations, and that admission is conclusively fortified by the verdict against his co-defendant.

The judgment against the appellant was therefore right, and we perceive no available error in the record.

Wherefore the judgment against the appellant Redman is affirmed.

Jeff Brown, for appellant.

Craddock, for appellees.

SARAH ROYSE v. JNO. BLAIR.

Vendor and Purchaser—Reservation in Deed—Consideration for Release.

A deed contained the following provision "said vendors reserve for their use, etc, a sufficiency of said land, for their support and maintenance during their lives." Arbitrators having been appointed, some 30 acres were set aside for use of Royse and wife. At his death, the wife entered into an agreement with Blair the purchaser, "conditioned that when the surplus on hand etc., shall be used by me as a support etc., that he will on request of me, or my agent, lay off a sufficiency of land according to the arbitration bond now filed in Milton Howe's office, according to the requirements of said bond." Whereupon she surrendered to Blair the land. Held that in the absence of the filing of said bond or proof, and no provision being made for the support of the wife, it was without consideration for the surrender of the land.

APPEAL FROM ADAIR CIRCUIT COURT.

December 15, 1868.

OPINION OF THE COURT BY JUDGE WILLIAMS:

When Jno. Royse conveyed the land to Jno. Blair, March 26, 1853, he inserted the following provision, "the said Royse & Wife reserve for the use and benefit of Solomon Royse and Sarah his wife during their lives a sufficiency of said land to afford said Solomon and Sarah a support and maintenance during their lives." There arising a misunderstanding between Blair and Solomon Royse in 1856, they, by written agreement, submitted the matter to three arbitrators who designated some 20 or 30 acres of the land by metes and bounds to the old man, who continued to reside upon and control it until his death in 1858.

The next day after his death, Blair and Sarah Royse the widow, then far advanced in years and frail, entered into another obligation whereby she surrendered to him the land then set apart to her husband and herself upon "conditions as follows, viz: that when the surplus that is now on hand or may hereafter come to hand shall all be used by me as a support and maintenance, that he will on request of me or my agent lay off a sufficiency of land, according to the arbitration bond now filed in Milton Howe's office, to support me according to the requirements of said bond."

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Solomon Royse's estate was insolvent, therefore, the widow got but little from it. The arbitration bond named in said obligation has not been filed nor proved, its terms are therefore unknown to us; the parties may have meant the written submission but it makes no provision for her support. No consideration, therefore, for the surrender of said land is made to appear.

But Blair insists that as she had a pension from the Government, because her husband was a pensioned soldier, which is sufficient to support her, that she has no claim on him and therefore her suit should be dismissed, seeking an allotment of said land and to hold him responsible for her support since the surrender of the land. The court allowed to her the land but adjudged costs against her, and dismissed her petition as to any claim for damages.

Sarah Royse, even by the writing which she signed did not agree to appropriate her pension to her support and certainly Blair had no right to demand this.

It is true her son William witnessed the writing she executed to Blair, but her advanced age, the circumstances under which it was executed, its own ambiguous terms and the total want of an adequate consideration are all persuasive arguments against its validity. Blair should have been held responsible at least for the reasonable value of the rents of the land assigned to Solomon Royse from the time she surrendered until the final adjudication and then it should be put under her control during her life, and he should be adjudged to pay her the legal costs expended in this suit.

Wherefore the judgment is reversed with directions for further proceedings consistent herewith.

Russell & Avritt, for appellant.

James, Garnett, for appellee.

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J. W. ROSS v. L. F. & J. SANDERS.**Landlord and Tenant—Tenant not Liable for Natural Decline in Value.**

A tenant cannot be held liable for the natural decline of property, used by him in the cultivation of a farm, where the stock, implements, etc., were to be furnished by the landlord.

Same—Rents—Damages for Non-Performance of Contract.

Under a contract between landlord and tenant, to cultivate a farm and profits to be yearly divided, the landlord is not entitled to charge for rents of the farm. If the tenant fails to perform his contract, the landlord is entitled to damages, but a reasonable rent of the land, would not be a criterion therefor.

Limitations—Statute of.

In the settlement of mutual accounts between landlord and tenant, under a specific lease, the Statute of Limitations will not apply for either party.

Landlord and Tenant—Tenant Entitled to Credit for Portions of Lands Sold by Landlord.

In a settlement of accounts between landlord and tenant, the tenant is entitled to credit for an allowance for whatever portion of the leased premises may have been sold and delivered to others by the landlord.

APPEAL FROM OWEN CIRCUIT COURT.

December 10, 1868.

OPINION OF THE COURT BY JUDGE WILLIAMS:

February 10, 1858, appellant leased from appellees their farm consisting of two contiguous tracts, the lease was for five years, the tenant was to manage and control and work the farm and the landlords were to furnish in addition to the farm, sufficient stock to carry it on, and the products and profits were to be yearly divided. The tenant took possession and the land-lords furnished horses, oxen, cattle and hogs and the tenant used a portion or all of the corn and hay &c then on the farm.

One of the tracts was disposed of by the land-lords at the end of two years and the tenant had to or did rent it yearly afterwards.

After the expiration of the lease this litigation began, the land-

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lords charging the tenant with the stock, corn, hay, &c., and rents.

The tenant by answer and cross petition, denying his responsibility also going for corn, wheat, rye and other articles delivered to the land-lords and claiming he had returned some or all of the stock. In this state of the proceedings the case was referred to the master who reported in favor of the land-lords a balance of \$887.75 cents and which the court confirmed and rendered judgment thereon, notwithstanding the exceptions taken thereto. The two horses are charged against Ross at \$225, and though he returned them he is credited by only \$150, thus making him responsible for the deterioration in value by age and use without showing any special reason therefor. As to the natural decline by age and use Ross is in no wise responsible; the landlords were to furnish these, and when returned the account therefor was fully cancelled.

No rents could be charged and all items in the landlords favor therefor were erroneous. If Ross did not perform his contract, the land-lords would be entitled to such damages as they may prove, but the reasonable rents of the place would not be the criterion; beside Ross is entitled to an allowance because a portion of the farm was sold and he lost its use, as he had to arrange with Gales for it.

No statute of limitations apply for either party in settling their mutual accounts, and all items for corn, wheat, rye &c. as established by Ross, should rebut so much of the account which the Sanders may establish against him.

For these errors the judgment must be reversed with directions to again refer the matter to a master to take proof, report it as well as a balance sheet to court and to adjust up the various items of each party on the principles herein indicated, not refusing either party proven items because of limitations only as to matters of balance, until the accounts are balanced, neither can bar the other as each item should be regarded *pro tanto* a judgment.

Judgment reversed.

Lillard, for appellant.

Drane for appellee.

ISHAM G. SELLARS &C., v. SAMUEL D. SUTTON.

Instructions—Adverse Possession—Conflict of Proof is Question for Jury.

Where the proof does not clearly show whether the possession of a plaintiff was as joint tenant and therefore not adverse in law, or was in severalty, and therefore apparently adverse in both law and fact, it is error for the Court to exclude, by an instruction, this question from the consideration of the jury.

APPEAL FROM HENDERSON CIRCUIT COURT.

December 22, 1868.

OPINION OF THE COURT BY JUDGE ROBERTSON:

No platt being exhibited there is much difficulty in applying the testimony as to the possessory claim of the appellant Sellars. Whether his possession was as joint tenant, and therefore not adverse in law, or was in severalty and therefore apparently adverse in both law and fact, the record does not clearly show. The jury ought to have been permitted to decide that question.

On the facts appearing in the record the circuit court should not assume that Sellar's possession was not in law, as well as in fact, adverse for 15, or even 20 years. And therefore there is apparent error in the instruction excluding that question from the consideration of the jury.

Consequently for this only apparent error, the judgment is reversed and the cause remanded for a new trial.

Crockett, for appellants.

Vance, for appellee.

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E. M. HOLTON v. CATHERINE HOLTON.

Divorce—Pendente Lite Allowance for Maintenance.

An order of Court for a payment of \$300 to the wife for her maintenance in an action for a divorce, a *vinculo*, held not to be excessive, but necessary and proper by the action of the plaintiff in prosecuting his suit.

Costs—Divorce.

Under Sec. 32, Chap. 25, Rev. Stat. requiring the husband to pay all costs of a divorce suit, where the wife is not in fault, held, that though the lower court granted the relief of the plaintiff, for which a reversal could not be had costs were properly adjudged against him on the evidence, the wife proving their separation to be only temporary.

Covenant—Divorce.

A contract of separation by husband and wife, with a provision which obligated the wife not to impose on him any liability "nor in any manner whatever, make him or his estate responsible for any money or debts other than the note before mentioned," held not a guarantee against an allowance, *pendente lite*, by the court of \$300 for the maintenance of the wife.

APPEAL FROM GRANT CIRCUIT COURT.

December 12, 1868.

OPINION OF THE COURT BY JUDGE ROBERTSON:

After co-habiting for some years as husband and wife without issue, Elijah M. Holton and his wife Kate Holton through a friend as her agent and trustee, made a contract of separation whereby he, by his note, agreed to pay to her trustee for use \$1,642.76 as the value of the property contributed by her to their joint stock, and her trustee personally covenanted that she should neither claim any more of his estate, nor, by any contract as his wife, impose on him any liability, nor, "in any manner whatever, make him nor his estate responsible for any money or debts other than the note before mentioned."

On that basis the separation at once ensued. And, not long afterwards, her husband brought this suit against her for a divorce *a vinculo* on the sole charge that the genital organs had without

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her fault so far lost their normal health and capacity as to prevent sexual intercourse.

Her answer denied that the separation was voluntary on her part, and, admitting as charged the cause of a temporary non-intercourse, averred that she had been, by medical treatment, relieved from her transient disability and restored to perfect health before the separation and she desires a restitution of conjugal rights.

After the separation had continued a year the appellant amended his petition by charging "abandonment" for more than one year and seemed to waive his first ground.

During the progress of the case the trustee was made a co-defendants and his answer, concurring substantially with that of Mr Holton, he, by cross-petition claimed a judgment on the note which the appellant resisted without a credit for \$300 which pendente lite the court had compelled him to contribute to his wife's maintenance.

The circuit court having adjudged the payment of the note with some interest and divorced the appellant from his wife without any further provision for her, he insists on a reversal of the judgment against him for causes. 1st, because the court adjudged the payment of interest. 2nd, because it did not allow him credit for the \$300, and 3rd, because the costs were adjudged against him. Neither of these grounds is available.

1. The alleged tender when the note became due is denied, and this record contains no proof of it. And certainly therefore there can be no valid reason why interest should not have been exacted, to a greater extent than the judgment required.

2. The covenant of indemnity, according to our construction of it, did not guaranty against the court's incidental allowance for maintenance during the pendency of the suit for a divorce which does not appear to have either been proper or contemplated by Mr. Holton when she consented to the contract of separation, nor was such an allowance embraced by the letter or spirit of the covenant. Moreover it was not her voluntary act but the act of the court necessitated by the appellant's own conduct in prosecuting such a suit and thus making the allowance both proper and necessary.

3. While the statute forbids a reversal of any decree of divorcement we can, at least, say in this case that the 32nd Sec. chapter 25, requires the husband to pay the costs of a divorce when the

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wife is not in fault as she seems not to have been in this case, and that there was no good cause for dissolving the marriage tie on the appellant's petition. And consequently, as he wrongfully produced all the costs he ought to have paid all, both ordinary and extraordinary.

The record exhibits no evidence. And we feel assured that our decision is as favorable to the appellant as the pleadings and exhibits will allow.

Wherefore the judgment is affirmed.

Landram, for appellant.

GRANVILLE H. HIGGINSON v. DAVID B. WHITE, ROACH & Co.

Trusts—Right of Redemption of Trust Property—Sales.

A sale of mortgaged property with a right of redemption by the mortgagor being given by the purchaser, the property being of a value of \$2,000 and sold for \$179.08, and the mortgagor continuing in possession without a definite contract as to rent or future surrender, is held not to be a sale absolute, but in trust for the creditors of the mortgagor.

Same—Lien.

Upon a subsequent sale of the property, the former mortgagee will be entitled to a prior claim upon the sale funds, out of which his lien will be first settled.

Accounts—Accounting—Guardian and Ward.

An account against a guardian, though the evidence conduces to prove a part of same was not just, where the guardian admits the whole amount to be due, and himself became a witness to prove it, will be enforced by a judgment of the Court, as against a third party.

APPEAL FROM GREEN CIRCUIT COURT.

December 3, 1868.

OPINION OF THE COURT BY JUDGE HARDIN:

David W. Higginson was appointed guardian for the appellant G. M. Higginson in 1856 and acted as such until in February,

1865, when he resigned, having a few days before made a statement of his accounts, by which he was shown to be indebted to his ward in the sum of \$848.23, less a credit of \$4.

In the meantime said D. W. Higginson and Aaron C. Higginson having become indebted in various amounts to the appellees White, Roach & Co., and others on the 13th of February, 1860, made to their said creditors a mortgage of certain property, including a tract of about 330 acres of land, or the undivided interest of six-sevenths which was owned by said D. W. Higginson (the residue being owned by said G. M. Higginson), and under a judgment foreclosing the mortgage the said 6-7 of the land was sold on the 13th of October, 1860, and purchased by White, Roach & Co. for \$179.08; they also purchased the other mortgaged property amounting to about \$2,100. The land was conveyed to the purchasers by a commissioner in February, 1861.

On the 30th day of March, 1865, said G. M. Higginson, suing by a next friend, he being still an infant, brought this suit in equity against White Roach & Co., and D. W. Higginson and others setting up said indebtedness of D. W. Higginson of \$852.23 and alleging the purchase of the land by White Roach & Co. to have been made for the benefit of D. W. Higginson and in pursuance of a fraudulent arrangement and combination between him and them, to hinder and delay his creditors, and that the land, which the plaintiff sought to subject to his debt was of the value of \$3,500, and had remained in the possession of D W. Higginson under an agreement that he should redeem it by paying \$179.08 and interest, and that he had actually paid to White Roach & Co. \$100 thereof.

D. W. Higginson answered the petition, substantially admitting the material averments thereof and White, Roach & Co., also answered, controverting the allegations imputing fraud to them or any agreement or contention between them and D. W. Higginson, by which the purchase was for benefit or otherwise than in their own right, and they also denied the alleged value of the land and agreement for the redemption of it as well as the alleged payment of \$100, and though they admitted that D. W. Higginson remained in possession of the land they alleged that he did so as their tenant only.

They also controverted the plaintiff's claim, which is stated in the settlement of the guardian to be for \$256.25 for difference

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in a division of slaves and \$230.50 for hire of a slave named Taylor and \$128 for rent of land and \$237.48 interest on said sums and they charged that the settlement was fraudulent and made by D. W. Higginston to furnish a pretext for the plaintiff, who was his brother, to subject the land, and that on a just settlement he owed the plaintiff nothing. They also alleged that D. W. Higginston was largely indebted to them in amounts which were not embraced in the mortgage, and prayed that in the event the court should vacate their purchase that their claim might be enforced against the land.

The court rendered a judgment in favor of the plaintiff as against his late guardian, but dismissed his petition as to White Roach & Co., and this appeal seeks a reversal of that judgment.

It sufficiently appears that the 6-7 of the land which was sold for \$179.08 was worth about \$2,000, and if the deposition of D. W. Higginston was rightly excluded, still the testimony of Thompson, A. C. Higginston, Crawford and other competent evidence sustains the conclusion that an arrangement existed between Durham, one of the firm of White, Roach & Co. and D. W. Higginston under which Durah bought the land at the grossly inadequate price of \$179.08 the balance of the mortgage debts, for the benefit of Higginston and to be relieved of their claim by the payment by him of the \$179.08, or in other words, that he might redeem the land, and the fact that Higginston continued in possession without any definite contract as to the payment of rent or future surrender of the possession consists with and corroborates the above conclusion.

There is evidence tending to show that part of the \$179.08 was paid to the appellees, but the court will ascertain on the return of the cause whether this be so or not.

It is insisted, however, for the appellees that the appellant does not stand in a position to assail their claim because he has no just claim against D. W. Higginston.

Although there are facts conducing to show that D. W. Higginston purposely permitted himself to be charged, in principal and interest, a greater amount that he really owed the appellant on the settlement of his accounts as guardian, yet as it seems to us that a part at least of the amount claimed is just and ought to be enforced, we cannot sustain the judgment of the circuit court on the ground that the appellant was not a creditor of D. W. Higgin-

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son, and as the latter did not controvert it, but admitted it and became a witness to prove it, the court rightly gave judgment for the amount as against him, and on the return of the cause the court will enforce it by a sale of the land, providing however for the satisfaction of so much of said \$179.08 and interest thereon as remains unpaid for which the appellees have a prior lien on the land.

And as to the other claims of the appellees which were not embraced by the mortgage proper proceedings may be had for their enforcement if just, subject to the debts herein adjudged in favor of the appellees and the appellant which shall take priority as herein indicated.

Wherefore, the judgment dismissing the petition as to the appellees White, Roach & Co. is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

James, for appellant.

Rodman, Chelf, for appellees.

W. W. HULL v. JESSE EVANS.**Detinue—Action for Recovery of Money had and Received.**

A payment by a father for necessities for the family of his daughter out of funds placed in his hands by her husband, it not a good defense to an action for the recovery of the amount by the daughters husband.

Lands—Purchase for Husband and Wife—Estoppel.

Where funds are placed in the hands of a third party by a husband, with which to purchase a home for himself and wife, and afterwards is present and does not object to the conveyance being put in the wifes name, he will be estopped from claiming an improper use of the money and recovery thereof.

APPEAL FROM MADISON CIRCUIT COURT.

December 1, 1868.

OPINION OF THE COURT BY JUDGE HARDIN :

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The appellant, who married the daughter of the appellee, Jesse Evans, purchased of Samuel Hull, his father, about 68½ acres of land, and appears to have used in paying for it some \$1,200 which the appellee had given his daughter, the wife of appellant.

On the 29th of August 1864, the appellant and his wife sold and conveyed the land to Milton Pyles for \$2,744, one-half of which was paid, and for the balance of \$1,372 Pyles gave his note payable at twelve months from said date.

It appears that an arrangement existed between the appellant and his wife and Evans that through the agency of the latter a farm should be purchased and paid for in the State of Illinois with the proceeds of that sold by appellant and his wife in Kentucky, but whether such agreement was made before or after the sale to Pyles does not clearly appear.

It does appear that the appellant placed in the appellee's hands \$1,150 of money paid by Pyles and on the 28th day of March, 1865, he endorsed and delivered to him the note of Pyles for \$1,372.

It also sufficiently appears that in the summer of 1864 the appellant and Evans went to Illinois together in search of land for a home for appellant and his wife, and the appellant having returned to Kentucky leaving Evans in Illinois, the latter on the 20th day of August, 1864, purchased of John Smith a tract of 117½ acres of land for \$2,300, payable as follows: \$1,150 October 1st, 1864, and \$1,150 October 1st, 1865, with interest from October 1st, 1864, and Evans having taken Smith's bond for a conveyance to himself afterwards made the following endorsement upon it:

"October, the 1st, 1864.

"Mr. John Smith: When you make the deed to the farm I bought of you, deed it to my daughter Celia B. Hull.

" Yours respectfully,

" Joseph Evans."

Evans appears to have paid Smith for the land, and the latter conveyed it to appellant's wife on the 11th of April, 1865, as directed by said endorsement on the bond, and it also appears that the appellant, who had then removed to Illinois and lived on the land was present when the deed was made and sanctioned the conveyance to his wife as ordered by Evans.

The appellant seems to have left his family after living on the

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land about one year, and returned to Kentucky through the procurement of Evans, apparently afflicted in body and mind and he subsequently brought these suits against Evans for the \$1,150 placed in his hands and against Pyles to compel payment to him of the note for \$1,372.

Evans being a defendant to the suit against Pyles as well as the other action, which was consolidated with it, resisted the plaintiffs claim in both cases, claiming that the money was paid and the note delivered to him under said arrangement, and that \$2,300 was invested in the land bought of Smith and the residue of the amount of said note and money was applied by him to pay for necessities furnished the plaintiff's family.

Both petitions were dismissed, and the plaintiff has appealed to this court.

Although the evidence conduces strongly to the conclusion that the unfortunate separation from his wife was not voluntary on his part and may have resulted from the improper agency of the appellee, as it appears to us the \$1,150 and note of Pyles were placed in the hands of Evans as the means of paying for land to be conveyed to his wife, and the land in Illinois was conveyed under that arrangement to the appellant's wife; the appellant ought not in any event to recover more than the excess of the amount of the money and note put into Evans' hands over and above the \$2,300 and interest paid for the land.

But as to the excess or difference between the amount of money and the note placed in the appellee's hands and the sum paid for the land, it does not seem to us that the defense was sustained and the court will on the return of the cause ascertain and render judgment for the plaintiff against Evans for that amount.

Wherefore, the judgment is reversed, and the cause remanded for judgment as herein directed.

Stanton & Throop, for appellant.

H. Taylor, for appellee.

D. R. YOUNG & Co. v. GABRIEL BOOARD'S HEIRS ET AL.

Fraudulent Conveyance—Lasches—Creditors.

Where one assigns all chattels, choses in actions etc., for the benefit of his creditors, and the trustee appointed, fails to act, and the assignor permitted to control, consume or squander the assets, the creditors are held to be guilty of lasches.

Same—Proof of Insolvency of Debtor—Estoppel.

In the absence of proof of the insolvency of a debtor, but that the evidence conduces to show that all personal property, assigned for the benefit of creditor, was ample to liquidate all claims, the creditors will be estopped from further action to set aside conveyances of real estate as fraudulent.

APPEAL FROM MEADE CIRCUIT COURT.

October 19, 1868.

OPINION OF THE COURT BY JUDGE WILLIAMS:

It does not sufficiently appear from the evidence either that Gabriel Booard was insolvent at the time or that he made the conveyance of the house and lands to Alex McCause in contemplation of insolvency. The inference from the evidence is that his good and notes, accounts, &c., stock, negro slaves, &c., that he, then and afterwards, owed, were ample, had they been husbanded to pay all his debts.

After procuring the assignment to the benefit of his creditors by an agent of appellant's subsequent to said conveyance they paid no further attention to the matter and as the trustees did not accept or act Booard was permitted to control, consume or squander the assets. The judgment dismissing appellant's petition against McCause was therefore right and is affirmed.

Fairleigh, for appellant.

Walker, for appellee.

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C. D. SHEAN *v.* M. L. GIST ET UX.**Pleading—Sufficiency of Answer.**

An answer, purporting to be a counter-claim and set-off which fails to specifically deny the allegations of the bill, held, not to be sufficient to avoid a judgment theretofore rendered by default.

Same.

It is not error to refuse the filing of an answer to a petition, at the succeeding term of the Court, at which judgment by default had been rendered.

APPEAL FROM HARDIN CIRCUIT COURT.

October 15, 1868.

An action ordinary was instituted in February, 1866, against Shean by appellees to recover \$1,050 rent on 104 acres of land for a period of five years, which Shean had in use, and in April, 1866, an amended petition was filed, alleging an indebtedness of \$1,075 for hire of personal property. At the June, 1866, term of court, the petition first filed was read, and no answer having been filed, judgment by default was rendered, and at the December term, 1866, no answer having been filed to the amended petition, judgment by default was rendered on that; on motion of defendant at the same term, this latter judgment was set aside, and a summons awarded him against plaintiffs to show cause why the judgment at the June term should not be set aside, and on the same day defendant filed his answer in which no denial is made of the alleged use of the land as shown by the original petition, but says "he used a piece of land near by his own, which was worth about \$25 per year, etc.," and alleges as a set-off, numerous small improvements in the way of ditching, fencing, etc., but makes a positive denial, supported by affidavits, to the amended petition. Summons was issued against appellees on the defendants answer and counter-claim, which was sent to Jefferson county, but were not returned. In February, 1867, a motion was made by appellees for an attachment against the property of appellant to satisfy the judgment of June, 1866, and certain property levied on by the

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sheriff to satisfy same. Whereupon an appeal is prosecuted by defendant, from said judgment of June, 1866.

OPINION OF THE COURT BY JUDGE ROBERTSON:

The failure to answer the petition in proper time authorized the judgment as rendered. There was no available error in refusing the answer when offered. It did not show the ground of the suit to which it referred, nor did it present on its own face any good ground for changing or suspending the judgment which the petition of the appellees was seeking to enforce.

We see no error in the judgment appealed from. It is therefore affirmed.

Shean, Wintersmith, for appellant.

Stirman, for appellee.

W. H. KEEN ET AL V. COMMONWEALTH.**Criminal Law—Indictment—Offence of a Breach of Tavern Bond.**

A surety on the bond of tavern keepers cannot be prosecuted under an indictment alleging an "offence of a breach of tavern bond." A surety is not subject to indictment; he can only be proceeded against under a civil action.

Same.

Such proceeding, being a prosecution, not for a misdemeanor, but for a mere breach of his obligation to recover the statutory penalty, is not the subject of an indictment, which is an accusation by a grand jury charging a person with the commission of a public offence.

APPEAL FROM BALLARD CIRCUIT COURT.

December 17, 1868.

OPINION OF THE COURT BY JUDGE HARDIN:

An indictment was found by the grand jury of Ballard county against the appellants Hill and Keen as tavern keepers, and the appellant Crice as their surety in their bond as such, for the

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alleged "offense of a breach of tavern bond," the specific charge being that said Hill and Keen, being licensed to keep a tavern, and having with their said surety covenanted that they would not suffer or permit any person to tipple or drink more than was necessary in their said house, did suffer and permit one Hayden Roberts to do so.

The court having overruled a demurrer of the defendants to the indictment, they pleaded "not guilty," and on a trial of the issue, a verdict was rendered that they were "guilty as charged in the indictment," and thereupon the court gave judgment against them in favor of the Commonwealth for \$300, and the court having refused to grant a new trial the defendants have appealed to this court.

The proceeding is not merely a prosecution against Hill and Keen for a public offense in permitting excessive drinking in their tavern house, but so far as Crice, their surety is concerned at least, is a prosecution by indictment, not for a misdemeanor, but for the mere breach of his obligation, to recover the penalty of \$300 prescribed by the 7th section of chapter 99 of the Revised Statutes. Whatever may have been his liability it was not the subject of an indictment which is an accusation by a grand jury charging a person with the commission of a "public offense" (Criminal Code, section 100. *Margoley vs. Commonwealth*, 3 Met., 405).

Whether it might have been proper to proceed by indictment to convict the principals, and then by a summary civil proceeding to fix the liability of the surety as seems to have been recognized by the court in *Margoley vs. The Commonwealth*, 3 Metcalf *supra*, or to prosecute a penal action against the obligors in the bond, it is obvious that the prosecution of Crice by an indictment as for a misdemeanor was unauthorized by law, and the court erred in rendering the judgment against him, jointly with Hill and Keen on the verdict of the jury.

Wherefore, the judgment is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Marshall & White, for appellant.

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KENTUCKY INSURANCE COMPANY v. PARKER JONES.

Fire Insurance—Cancellation of Policy.

The wrongful procurement of a policy of Insurance by the Company, and cancellation of same, will in no manner protect them against their responsibility on account of the loss of the insured property by fire.

Same—Duty of Agent to Properly Describe Property.

A variance between the policy and the application as to the description of the property is unavailable to the Company it being their duty in filling out the policy to describe it to a common intent; for which error, they are at fault, and not the insured.

Attachment—Creditors Right to Proceeds of Insurance Policy.

A creditor, as vendor of the insured property of one to whom the policy had been assigned, has a right to attach the liability of the Insurance Company to the assignee.

APPEAL FROM JEFFERSON CIRCUIT COURT, CHANCERY DIVISION.

December 15. 1868.

OPINION OF THE COURT BY JUDGE WILLIAMS:

January 3, 1866, the appellant by writing endorsed on the policy of insurance made to Jones and Kelly, and who had assigned it to Edie & Ames and who had assigned it to W. J. Ames & Co., consented to the latter assignment and recognized the interest of W. J. Ames & Co.

After W. J. Ames secretly left Louisville, said policy wrongfully fell into the hands of Barrett and from him appellant wrongfully obtained it and illegally cancelled the same, but which can in no manner protect them against their responsibility on account of the loss of the insured house by fire.

The variance between the policy and the application and description is equally unavailing; the officer knew the property sought to be insured and it was their duty in filling out the policy to describe it to a common intent at least, if this was not done, which we do not even intimate, it was their fault and not that of the assured, especially as they were ignorant Africans. Jones being a creditor, as vendor of the insured property, of W. J. Ames & Co. could therefore attach this liability of the Insurance Com-

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pany to them, and the court properly adjudged not only the amount of appellant's liability to W. J. Ames & Co. but appropriated this to the claim of the appellee Jones.

Wherefore, the judgment is affirmed with damages.

Stirman, for appellant.

Stratton, for appellee.

GREEN L. KEY v. WESLEY PHELPS.

Sales—Failure of Consideration—Fraud.

A sale of land by one, believing he held a good title to the land, is not fraudulent, where the land was afterwards, by will disposed of, said will not being of record at the time of the sale.

Same.

The purchaser being put in possession of the land, using it for several years, cannot claim a total failure of consideration and disregard the bond for title for a quit claim deed.

Specific Performance—Sales—Bond for Title.

Under a sale of land by bond for title, neither party being in fault as to the defective title, the vendee's remedy is for a specific execution, and not for recovery of the consideration money.

APPEAL FROM BULLITT CIRCUIT COURT.

December 16, 1868.

OPINION OF THE COURT BY JUDGE WILLIAMS:

When Phelps sold by quit claim the land to Key he doubtless believed he had the title and so did Key, as no one had then propounded the will of Mrs. McHarous' deceased father. Key was put into possession and enjoyed the land for several years, therefore, there was not a total failure of consideration to authorize a disregard of the bond for a quit claim deed, no such fraud shown as to make it void, and had there been, it would have been barred unless this had been discovered within five years before bringing the suit. There was no error in adjudging against the plaintiff's

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right of recovery for the consideration money, and though the judgment for a specific execution seems entirely fruitless, yet this is the most appellant is entitled to. Judgment affirmed.

Bunch & See, for appellant.

I. & J. Caldwell, R. H. Field, for appellee.

H. HAMMOND ET AL V. W. H. & F. SANFORD.

Consideration—Failure of—Bills and Notes.

A note given for the purpose of securing the discharge of one from the Army, is held to constitute a valid consideration, as to counsel and assist a man to obtain his discharge in a legal manner is neither illegal nor against public policy.

APPEAL FROM OWEN CIRCUIT COURT.

December 10, 1868.

OPINION OF THE COURT BY JUDGE WILLIAMS:

There is no issue of *non est factum* as to the note sued on, but on the contrary, appellants in their answer say, "they executed the note sued on," they then attack it for want of consideration and because the consideration was illegal and against public policy, it being given to procure Hammon's discharge from the draft of the United States in the late war, therefore, all the evidence tending to establish that this note was not executed but a blank note for one hundred dollars more was wholly irrelevant to the issues. The evidence neither established a want of consideration nor a vicious one. To counsel and assist a man to obtain in a legal manner a discharge from the draft is neither illegal nor against public policy, but is simply to aid him in vindicating his legal rights, as is the case in the employment of all lawyers. Judgment affirmed with damages.

McManama, for appellant.

Drane, for appellee.

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O. D. HARRIS *v.* IRENE C. BEAZLEY ET AL.

Pleading—Time of Filing Answer and Cross Petition.

A pleading filed as an answer and cross-petition after the final decision of the appellate court, and before the mandate had been entered in the Circuit Court, could not be admitted as an answer, and as a petition for review, it is premature until the mandate had been entered.

Same—Bill of Review—Newly Discovered Evidence.

In the absence of an allegation in a bill of review, that evidence, offered to sustain same, might not, by ordinary diligence, have been discovered in time to have been used on the first hearing, it is not error to dismiss the proceedings.

APPEAL FROM GARRARD CIRCUIT COURT.

December 21, 1868.

OPINION OF THE COURT BY JUDGE ROBERTSON:

The pleading filed as an answer and cross-petition, after the case had been finally decided by this court and before the mandate had been entered in the circuit court, could not be admitted as an answer when the case was not open for it; and, as a petition for review, it was premature until the mandate had been entered.

But, waiving these formal objections and, by a liberal construction, considering the document as a bill of review on evidence discovered after the final decree, there was no error in the dismissal of it on the evidence as taken under it.

1. There is neither allegation nor presumption that the supplemental evidence might not, by ordinary diligence, have been discovered in time to have been used on the first hearing.

2. Waiving that irreparable difficulty, the new evidence does not essentially change the case, and, had it been taken before the first decree by the circuit court, the principles on which this court reversed that decree would have led to the same conclusion and reversal.

Wherefore, the judgment is affirmed.

Dunlap, for appellant.

Bradley, for appellees.

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GEORGE FERGUSON ADMR. v. THOMAS JOHNSON ET AL.

Appeal and Error—Appearance in Appellate Court—Waiver of Errors.

The appearance before the appellate court by brief, of an administrator, and as to whom no appeal had been taken nor bond executed, will cure any defects in errors or irregularities, against which he cannot complain.

APPEAL FROM MONTGOMERY CIRCUIT COURT.

September 11, 1868.

OPINION OF THE COURT BY JUDGE WILLIAMS:

In the bill in equity filed in Virginia by Willis Roberts and Thomas Johnson, it is averred that George Ferguson paid over to said Roberts in January, 1861, as profits on the partnership drove of horses \$356. It was therefore clearly right in the commissioner, in stating the accounts between the several partners in this suit, to charge Roberts' administrator with this \$356, and erroneous in the court to strike it out, Ferguson should be credited by and Roberts charged with this payment.

Roberts' administrator excepted to this item because it was the same as the one for \$325, charged by Ferguson to Johnson as shown by James Johnson's deposition, on examination of the deposition it is not perceived that this identity is established, but if it was it would tend rather to prove the error in charging Johnson instead of Roberts, but Johnson does not complain of the item of \$325 charged against him.

It is said in argument that parol evidence was heard upon the trial of the exceptions. There is no evidence of this in the record, and being an unusual practice we cannot presume it from the mere order giving appellant time to present his bill of exceptions; and we can hardly presume that evidence contradicting Roberts' own allegations was received, or if so, that these were disproved.

Had Roberts' administrator not appeared to this appeal and had not the parties treated him as an appellee, we could not say on this record that the appeal was against him, as the appeal bond and writ are alone as to Johnson. But he has appeared by brief and the only error assigned by appellant is as to Roberts' admin-

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istrator, hence we conclude that he was the real and substantial party and his appearance has waived all errors or irregularities as to him.

The judgment is reversed for the correction of the error pointed out, but with discretion in the court below to hear additional proof by depositions or to refer it to a commissioner to hear and report the evidence, &c.

Brock, Turner, for appellant.

Reid & Reid, for appellee.

JOSHUA DAVIS ET AL' v. WILLIAM HIGGENBOTHOM ET AL.

Implied Trust.

It is shown that a father, for a grossly inadequate consideration, transferred to two of his sons, large tracts of land, on assurances from them, that it would protect him from a possible judgment and loss on a bond then outstanding, and also that the lands should be held by them for all the children, also that the payment of the consideration was denied by witnesses. It was held in the names of the sons for some eighteen years. In a suit by all the heirs, held to be both an express and implied trust.

Limitations of Actions—When right of Action Accrues.

Where property, held under an express or implied trust, which would not accrue until the death of the grantor and a refusal to fulfil the trust, neither a statutory nor presumptive bar will apply.

APPEAL FROM GARRARD CIRCUIT COURT.

December 16, 1868.

A petition was filed in the Garrard circuit court by the heirs of E. Higgenbothom against appellees to cancel deeds executed by E. Higgenbothom and wife to them, which were made some fifteen or twenty years prior thereto, claiming that the deeds had been secured by undue influence and false representations. Defendants answering, denied all the allegations of the petition, and claimed the land purchased in good faith, for a valuable consideration.

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They file with their answer and make it a cross-petition against one of the plaintiffs, Joshua Davis, who had been living on part of the land for a number of years, asking for a writ of possession against Davis, and a judgment against him for \$1,200 for rent. Defendants also claim the land by virtue of their long possession, and set this up in bar of the action. The preponderance of the evidence showed that defendants had secured the deeds from their father and mother by representing that it would save the land being sold under a supposed claim against one of their uncles which might fall on their father, and that it would be held in the name of defendants for the benefit of all the heirs. The father continued to live with Davis, cross-defendant, and exercised and openly claimed ownership over the land. Davis took care of the old man, and did considerable repairs to the place, which had begun to deteriorate, and it was shown that all this aid was more than an off-set to any rental that the place was worth. It was also shown that the consideration alleged to have been paid, was purposely paid to the father of the defendants "to make it look like it was legal," and several witnesses testified that the amount had immediately thereafter been returned to defendants. The consideration stated in the deeds was but a small part of the amount the land was worth at the time the deeds were made.

The chancellor, upon final hearing, dismissed the petition against defendant Davis in so far as a recovery of rents was sought, but sustained the cross-petition as to a recovery of the land from Davis and awarded a writ of *habere facias possessionem* to defendants.

From which decree plaintiffs, and defendant Davis, prosecute an appeal.

OPINION OF THE COURT BY JUDGE ROBERTSON:

Considering the condition of the old father Emanuel Higgenbothom, the influence of his sons George and William who could mould him like clay in the hands of the potter, the gross inadequacy of the ostensible consideration, the strong probability that none of it was paid by George, and the extreme doubtfulness of any payment by William, and the fact and circumstances conducing to show a fraudulent purpose and sinister consummation by these two sons, and proving that the conveyances now litigated

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were finally extorted from their father and mother by assurances that the lands should be held in trust for all their heirs, subject to equal distribution among them at his death; such a trust, both express and implied, is the plain and inevitable conclusion of reason and of law.

Consequently, as the appellants had no cause of action until the old man's death and a refusal to fulfill the trust, neither a statutory nor presumptive bar applies to this case.

Wherefore, the judgment dismissing the petition against George and William is reversed, and the cause remanded for further proceedings for distribution, by sale or otherwise, of the lands among all the heirs and an equitable adjustment of the rights of all parties.

But the judgment dismissing the petition against Davis is affirmed.

Bradley, Dunlap, for appellant.

Turner, for appellee.

JOHN CASEY v. HIRAM KLETTE.**Ejectment—Notice to Tenant—Hostile Possession—Landlord and Tenant.**

In an action of ejectment, where a tenant, repudiating his lease and claiming title to the land, changed the possession from a friendly to a hostile holding, it is not necessary for the owner to give notice to vacate the premises.

APPEAL FROM KENTON CIRCUIT COURT.

September 24, 1868.

This was a suit for ouster of appellant from certain lands held by him under lease from Merritt Hodges. Klette was the original owner of the land, and his tenants allowed Hodges, some 10 or 12 years before, to come into possession of same, under an alleged lease from Klette, and three years before the institution of this action Hodges placed John Casey in possession as his tenant, who refused to vacate, claiming title to the lands. The evidence showed

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Hodges to have been an intruder, having gone to the agent of Klette and asked to lease the premises, and was informed that he would have to see Klette in person. Several days later Hodges returned and informed the agent that he had seen Klette and it was all right, and thereupon took possession.

The instruction to the jury was "That if they believed from all the evidence that the defendant Casey entered on the land in controversy under Merritt Hodges, and that said Hodges entered on the land as tenant of the plaintiff Klette, they must find for the plaintiff."

From a verdict and judgment for plaintiff, defendant appeals.

OPINION OF THE COURT BY JUDGE PETERS:

It appears from the evidence that appellee had been possessed of the land claimed in this suit for many years; that Hodges ten or twelve years ago occupied the land claiming to have entered under appellee, and a short time before the bringing of this suit he put Casey on the land as his tenant, and renounced his allegiance to appellee.

The length of possession of appellee was sufficient of itself to enable him to maintain the action, and the repudiation of his right by Hodges, and his tenant, changed the possession from a friendly to a hostile holding, and they were not entitled to a notice to quit theretofore.

The evidence authorized the verdict, and there is no available objection, or error in the instruction.

Wherefore, the judgment is *affirmed*.

Carlisle & O'Hara, for appellant.

Stevenson & Myers, for appellee.

H. C. HOWARD *v.* M. MURPHY.**Instructions—Contrariety of Evidence.**

Where there is some contrariety of evidence a peremptory instruction should not be given, even though a second instruction be given, which might have cured the improper peremptory.

Pleading—Answer—Plea in Bar—Replication.

An answer, which presents a plea in bar, does not require a replication, as, under the provisions of the Civil Code, the plea stood denied except so far as confessed by the statements of the petition.

APPEAL FROM MONTGOMERY CIRCUIT COURT.

July 1, 1867.

Michael Murphy sued Henry C. Howard for \$82.03, being the balance claimed due him for services as a farm laborer, part of his wages, some \$111, having been paid by his employer. Defendant answered, denying the indebtedness, or any part thereof, but alleged in justification of his refusal to pay the demands of plaintiff, that he had employed said Murphy to work for him for one year for the sum of \$300. And that after serving for several months the said Murphy quit him and refused to perform further labors as per the contract. After some conflicting evidence was offered by both parties, the jury were given a peremptory instruction to find for plaintiff. Defendant filed motion for new trial, with affidavits of newly discovered evidence, all shown by a proper bill of exceptions.

The instructions referred to in the opinion are as follows:

1st. "The jury will find for the plaintiff the amount claimed in the petition, and may or not in their discretion, give interest from the institution of the suit."

2nd. "They will also find for the defendant the damages which they believe from the evidence, the defendant sustained by reason of the plaintiff's failure to work the remainder of the year from the 26th of May to 1st of October, and the difference between the value of plaintiff's services as a good gardner and farm hand, and the services rendered by him as he was. If the jury find for defendant on his counter-claim an amount equal to that

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claimed by plaintiff, they will find for defendant, but if less, they will subtract such sum from the amount due plaintiff, and render a verdict for the difference."

From a verdict for plaintiff in the sum of \$50 defendant appeals.

OPINION OF THE COURT BY JUDGE WILLIAMS:

The answer of defendant below was not an off-set or counter-claim, but presented an issue in bar which by the provisions of the Civil Code stood denied except so far as confessed by the statements of the petition; therefore it was not only unnecessary to reply, but no such pleading is known to the Code.

There was some contrariety of evidence; therefore, the jury should have been permitted to find on it without a peremptory instruction from the court to find for plaintiff.

It was erroneous to give the peremptory instruction, which was not cured by the following instruction, though they seem to be inconsistent.

As the judgment must be reversed for this error, it is unnecessary to say anything as to the discovery of the evidence after the trial.

Wherefore, the judgment is reversed, with directions for a new trial.

Holt, for appellant.

Tenney, for appellee.

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JAMES R. LEE ET AL v. AMBROSE B. CHEISTRY.

Pleadings—Answer—Necessary Parties Alleged to have been Omitted.

In a foreclosure proceeding, where several parties are interested, the that other parties are interested, and should be joined as defendants, to be a good defense it must also show the facts, and how that interest occurs to enable the court to determine the question.

Judgment—Must Show all Interests in Mortgaged Property.

In a foreclosure proceeding, where several parties are interested, the judgment must show the particular interest of each, to determine their standing in the issue.

Mortgages—Sale of Property Under Execution—Installments Not Due.

Where a judgment directs the commissioner to sell so much of the land as may be necessary to pay the installment of the purchase money then due and sued for if the whole tract would not bring more or not even enough to pay same, that fact would not deprive the judgment creditor of his right to his judgment and the execution thereof, other installments being not yet due.

APPEAL FROM FLEMING CIRCUIT COURT.

October 5, 1868.

OPINION OF THE COURT BY JUDGE PETERS:

of land described in the petition, and the enforcement of a lien.

This action seeks the collection of one installment for a tract on the same for its payment, and the foreclosure of a mortgage, and sale of the mortgaged property to pay another debt, which is different, and grows out of a distinct transaction from the land sale.

Appellee was by the court below adjudged entitled to the relief he sought, and appellants seek to reverse that judgment on several grounds, the first of which is a defect of parties defendants.

Baughman answered, and did not controvert the debt or his liability to pay it, but said the note sued on was one of those of like amount given for the purchase price of land, and as the other two were not then due appellee was not entitled to the judgment for that one which was due. Second, that quite a number of persons named in the answer, some of whom are non-residents of

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Kentucky, were interested in the matters and things involved in the action, and were necessary parties thereto, and that the summons was not served on either Lee or himself in the county of Fleming, and for these causes resists a trial and judgment. Lee failed to answer the petition.

What interest the persons named in the answer, and also the affidavit of counsel, had in the matters involved in the suit is not shown. In that branch of the action for an enforcement of the lien for the purchase money the deed of appellee and the note sued on are exhibits, from which it appears that appellants were the only purchasers, and they alone were bound for the price of the land.

In such case it was not sufficient to state that certain persons were necessary parties, but the facts should be stated so as to enable the court to determine the question. The mere affirmation of the defendant, and of counsel, was wholly insufficient. The first objection is, therefore, unavailing. Nor did the statements in the affidavits show any sufficient reason for postponing the trial; Baughman from all that appears knew all the facts in relation to the interest of these parties as well when his answer was drawn as when the affidavit was filed.

As to the second objection that the precise interest of Lee in the mortgaged property should have been stated in the judgment, it may be remarked that it certainly would be more direct and leave less for the master to do, and unless there were direct means afforded him to ascertain the interest, it would be error; but here he is ordered to sell *Lee's interest, &c.*, and by reference to the mortgage which is an exhibit in the cause he finds precisely what the interest is which he is required to sell.

As to the third and last objection, the judgment directs the commissioner to sell so much of the land as may be necessary to pay the installment of the purchase money then due and sued for, if the whole tract would not bring more, or not even enough to pay the same, that fact could not deprive appellee of his right to his judgment, and the execution thereof; it would be the misfortune of appellants, and might be that of appellee also, but his right to the judgment and sale must nevertheless be enforced.

Perceiving no substantial error in the judgment prejudicial to appellants, the same must be affirmed.

Phister, for appellants.

DAVID WEBB ET AL v. HALL & SUTTON.

Marshal's Bond—Mistake in Execution—Default Judgment.

On appeal from a judgment by default as to the validity of a marshal's bond reciting that "David Webb, as Marshal," and others as "sureties do hereby covenant that the said David Webb as constable of Daviess county shall well and truly etc.," an objection as to this informality is not available for the first time in the Appellate Court.

APPEAL FROM DAVIESS CIRCUIT COURT.

October 10, 1868.

OPINION OF THE COURT BY JUDGE WILLIAMS:

This was a judgment by default, at the suit of the Commonwealth for the use of Hall & Sutton, against the appellant Webb as marshal of Owensboro and his securities on his official bond.

The special statutes relating to this office required that the marshal should execute in the county court a bond to the same effect as constables are required to execute. This bond recites that "David Webb as *Marshal*" and the other named persons as "his sureties do hereby covenant" "that the said David Webb as *Constable of Daviess county shall well and truly*," &c. It is manifest upon the face of this bond that the county court used the form of a constable's bond and, though it is set out in the first recital that Webb as *Marshal* and his securities execute it, yet the covenant that Webb as constable was by oversight not altered to conform to the actual object, the obligatory covenants are required, by law, to be the same, it may well be questioned whether, upon a direct issue involving the sureties, this bond ought not to be held as a substantial compliance, but when the petition avers he did enter upon the discharge of his duties as marshal, and collected and failed to pay over the plaintiff's money as such, and this is not denied, the objection to this informality of the bond, for the first time made in this court, comes too late.

As the marshal had an unquestionable right to collect, within the limits of the town, if not within the entire county, which is not now necessary to decide, we cannot say upon the averments of this petition that said debtors did not reside or had property within

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the town leviable, and therefore, upon default we cannot say the petition does not show a cause of action.

Wherefore, the judgment is affirmed without damages, no supercedeas appearing.

Ray & Hardin, for appellant.

Sweeney & Stuart, for appellee.

W. J. LEWIS v. JAMES P. NALL.

Equity—Guardian and Ward—Necessities for Ward's Maintenance.

A ward cannot hold her guardian responsible for necessities furnished her, beyond her annual revenue which he had a right to anticipate, in the belief that ultimately the aggregate outlay would not exceed the aggregate income.

Same.

The matrimonial outfit of the ward is held to be "necessities" in a suit by a ward against her guardian for recovery of amounts advanced her beyond her annual income.

Same—Accounting—Waiver of Rights.

A settlement with a guardian by his ward and her husband, based on the commissioner's report, is held to waive her right of action against the guardian for payments to her upon her order, though they exceed her annual income.

APPEAL FROM M'LEAN CIRCUIT COURT.

October 9, 1868.

OPINION OF THE COURT BY JUDGE ROBERTSON:

In equity the ward cannot hold her guardian responsible for the supply of necessities, and especially, in her matrimonial outfit, beyond her annual revenue which he had a right to anticipate on such occasions, when her prospective income before the abolition of slavery justified the belief that ultimately the aggregate outlay would not exceed her aggregate income.

Nor can she justly hold him liable for her one-fifth of the price

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for which the slave Bailly was sold. The sale was apparently prudent and rightful; the administrator who held him concurring with the guardian of all the wards. And there does not appear to have been any culpable negligence in failing to collect the debt.

Moreover the settlement by the commissioner brought the ward in debt to the guardian and the settlement with him by herself and husband waived all those matters and left them in his debt, which they attempted to pay by an order on the administrator.

Under all these circumstances the appellants have no just cause to complain of the judgment dismissing their petition and allowing the appellee nothing, which is affirmed.

Bickers, for appellant.

R. L. WINTERSMITH v. H. G. WINTERSMITH'S ADX. ET AL.

Statute of Limitations—Bills and Notes—Presumptive Evidence of Payment.

Lapse of time cannot operate as a statutory bar to an action on a note, its only legal effect being presumptive evidence of payment as pleaded. A payment not pleaded, cannot be presumed.

APPEAL FROM HARDIN CIRCUIT COURT.

April 20, 1869.

OPINION OF THE COURT BY JUDGE ROBERTSON:

As lapse of time cannot operate as a statutory bar to the action on the note, it's only legal effect is presumptive evidence of payment as pleaded. But the record repels all presumption of payment in the mode specified in the answer; and therefore a payment not pleaded cannot be presumed.

And moreover the proof of the appellant's insolvency is sufficient to repel any presumption of payment in any mode.

Wherefore the judgment for the amount of the note and accruing interest is affirmed.

Cofer, for appellant.

Wilson, for appellees.

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A. T. & J. HARDIN v. JAS. M. CLARKSON ET AL.

Judgment—Favorable to Defendants.

A judgment of court, more favorable to defendants than the record discloses, and from which the complainants do not appeal, will not be disturbed.

APPEAL FROM KENTON CIRCUIT COURT.

May 30, 1868.

OPINION OF THE COURT BY JUDGE WILLIAMS:

If it be conceded that the sale of the office of pest settler by Campbell to Hardin was illegal and void and the express contract unenforcible by reason thereof, the consequence would be the implied assumpsit in law of the Hardins to pay Campbell for his houses and goods, which they got of him their reasonable cash value, which we think the court properly fixed at \$1,050, five hundred of which was paid down, leaving unpaid \$550.

This \$550, Campbell's creditors had a right to attach, and the court having so determined, A. T. & J. Hardin prosecute this appeal.

The court adjudged the \$550 due in three future payments agreeable to the contract, when the law assumed it to be due at once on the reception of the houses and goods, but this error could not be ungenerous to the Hardin's, and the creditors do not complain.

Judgment affirmed.

Carlisle & O'Hara, for appellants.

Opinion of the Court.

THOMAS E. MILLER v. AARON JAMES ET AL.

Demurrer—Defense to Action on Note—Pleading.

Where the facts, in an answer to a suit on a note, show it to have been given in consideration of a half interest in a business, and that the plaintiff had made no settlement of the partnership affairs, which was in liquidation, it is sufficient to constitute a good defense, and a demurrer thereto should be overruled.

APPEAL FROM MERCER CIRCUIT COURT.

September 16, 1868.

OPINION OF THE COURT BY JUDGE PETERS:

Whilst the first paragraph of appellant's answer is obscured by frequent repetitions, and redundant matter, and thereby vexatiously extended, still, the statements therein, that in the execution of the note sued on, there was a mistake of two hundred, or two hundred and fifty dollars, and a prayer for a correction of the mistake, are visible amidst the great confusion that prevails in the paragraph and it is moreover stated that at the time the note was executed the appellant, and appellee Aaron James entered into a co-partnership for the manufacture, and vending carriages, and buggies, and repairing such vehicles, and that said note was executed in part for stock in trade put into the business by said James, and that he had received considerable amounts of money belonging to the firm after its commencement for sales of carriages, repairs, etc., over and above his part sufficient to satisfy and discharge said note, and that there were partnership debts outstanding against the firm which the partners would be compelled to settle; and sought a settlement of the firm business, which it is alleged was unsettled, although the partnership was dissolved, and no settlement had ever been made, and moved to have the case transferred to the equity docket for that purpose.

These are material facts constituting a good defense to the action, and if true as admitted by the demurrer entitled appellant to relief against the note; consequently the demurrer was improperly sustained.

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As to the second paragraph of the answer, the whole seems to contain but one defense to the action, and as such could not have been divided into more than one paragraph, and retained its meaning and sense, consequently, it was improperly suppressed for the failure of appellant to divide said second paragraph into more paragraphs and number them.

Wherefore, the judgment is reversed and the cause remanded, with directions to overrule the demurrer to the first paragraph of the answer, to set aside the order suppressing and striking out the second paragraph. That the irrelevant redundant matter in the answer be stricken out at the cost of appellant, and for further proceedings consistent herewith.

J. D. Hardin, for appellant.

J. B. Thompson, for appellee.

ROBERT SNODGRASS v. CHARLES KIRTLY ET AL**Pleading—Petition—Written Instruments.**

To constitute a cause of action, it is necessary in a petition to allege that a letter of introduction, saying the party was a "clever gentleman," was written with a fraudulent intent, and that it was held as guaranty for the debt contracted thereunder.

Same—Notice.

For the writer of such a letter to be bound, it is necessary that he be notified that he would be held for any loss occasioned thereby.

APPEAL FROM ROCKCASTLE CIRCUIT COURT.

June 9, 1868.

OPINION OF THE COURT BY JUDGE PETERS:

There is no allegation in the petition that the letter addressed by Kirtly and Owens to appellant introducing Lewis to him as a "clever gentleman" was written with any fraudulent intent on their part, or that they knew Lewis to be of a character different from that which they represented.

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Nor is it alleged that appellant held their letter as a guaranty for the debt contracted by Lewis with him, and had notified them of the fact. The petition was therefore insufficient to show a cause of action against appellees in either aspect. Wherefore the demurrer was properly sustained, and the judgment is *affirmed*.

Carter, for appellant.

JAMES GARVIN'S EXOR. v. WILLIAM GARVIN.

Wills—Codicil—Effect on Prior Bequest.

Although a codicil to a will may operate constructively to revoke a former bequest, to authorize such construction, the intention of the testator to give the last legacy in lieu of the first must be fairly deducible from the testamentary writing itself.

Same.

A bequest to a brother of \$5,000 to be given by him to some charitable purpose, and a codicil which gives to said brother one-eighth of the entire estate, examined and held not to be inconsistent in that both payments should be made out of the estate.

APPEAL FROM LOUISVILLE CHANCERY COURT

September 26, 1867.

The 22nd clause of the will which is referred to in the opinion is as follows:

"As my brother, William Garvin, has requested that I should not leave any legacy to him, and as he and his family do not stand in need of it, at his request, I have omitted any provisions for his benefit, but as a substitute therefor, and as a testimonial of my warm and sincere affection for him and his family, I bequeath to my said brother, William Garvin, the sum of \$5,000 to be bestowed by him upon such religious or charitable objects as he may see fit. I leave it to him absolutely knowing that he will use it for the best purposes; and I desire in this connection to convey to his wife and children the strongest expression of my dying love."

On the day following the execution of the will, the testator made a codicil to his will, and gives his reason for it thus: "I have con-

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cluded to change and modify my said will, in reference to my brother, William Garvin, and I do this because I am unwilling to make the distinction between him and my other relatives, which is done by my said will." "With this view, I do hereby alter and change my said last will and testament in this respect." "I give, bequeath and devise the one-eighth part of my estate, real, personal and mixed, subject to the legacies provided for in my said will, to my brother, William Garvin, absolutely, to him and his heirs and assigns; and I direct my said executors, to pay, give and convey to my said brother, William Garvin, the one-eighth part of my said residuary estate, after the payment of the said legacies, so soon as they shall have made the division of my said residuary estate according to the terms and provisions of my said last will and testament, and I also hereby will and direct that my said executors shall pay to my brother, William Garvin, the one-eighth part of the income, rents, issues and profits of my residuary estate, up to the time at which they shall make the said division of my said residuary estate." "It being my intention to give to my brother, William Garvin, the one-eighth part of my residuary estate absolutely, and should any of my brothers or sisters die without lawful issue, then I will and direct that my said brother, William Garvin, shall be entitled to and receive his relative share of the share or portion set apart for said decedent. I therefore direct my executors to divide my said residuary estate into eight parts instead of seven, or into so many parts as may be necessary, including my brother, William Garvin, in the number of those who are to take one share or part." "I will and direct that my said executors shall carry out my said last will and testament in all other respects as is therein provided, it being only altered or modified so as to give my said brother, William Garvin, one share absolutely."

OPINION OF THE COURT BY JUDGE HARDIN:

Although it is true, as insisted for the appellant, that a second bequest in a will or codicil thereto may operate constructively to revoke a former one without an express statement in the will or codicil that such was the testator's intention, yet to authorize such a construction, the intention of the testator to give the last legacy in lieu of the first must be fairly deducible from the testamentary

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writing itself. There does not seem to be any such inconsistency between the the intention as expressed in the 22d clause of the will of Jams Garvin, to appropriate \$5,000 to be bestowed by William Garvin "upon such religious or charitable objects as he may see fit," and the subsequent provision for him as one of the residuary devisees, nor is the latter provision accompanied by any such qualifying or explanatory words, as would be sufficient in our opinion to work a revocation of the bequest of \$5,000, made as it was for peculiar reasons for objects and purposes not individually beneficial to William Garvin. And as the judgment of the court below conforms to our construction of the will, the same is affirmed.

W. F. Barrett, W. R. Thompson, for appellant.

Gazlay, for appellee.

DINSLOR v. FRESH ET UX.

Slander—Excessive Verdict—Passion or Prejudice.

In an action for slander, which was exceedingly aggravated, a verdict of \$8,000 for damages, held to be not so flagrantly excessive as to indicate passion or prejudice.

New Trial—Newly Discovered Evidence—Effect to Mitigate the Offence.

Alleged newly discovered evidence, though showing no semblance of justification for slanderous words, where its doubtful tendency might serve to slightly mitigate the amount recoverable, will authorize a new trial, and no wrong be done the appellees.

APPEAL FROM BRACKEN CIRCUIT COURT.

June 16, 1866.

The words spoken by defendant and sued on as slanderous, by the plaintiff are as follows, to wit: "Mary Fresh, you are a whore; a bad woman." Then to John Fresh, husband of Mary Fresh, defendant said: "Your wife cuts herself in the finger, when she was Brown's wife, and before you, Fresh, married her; you, Fresh, understand what I mean, Brown had to get a doctor

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to cure her twice." Defendant then laughed and said: "You, Fresh, understand that." All being spoken in the presence of several other parties. Testimony was alleged to have been discovered, after the verdict and judgment, of a former unlawful co-habitation with others.

OPINION OF THE COURT BY JUDGE ROBERTSON:

If the appellant, by diligent inquiry and careful scrutiny, might have ascertained before the trial that the appellee, Mary Fresh, was then pregnant, it might have been difficult, and probably impossible, to know that she had been impregnated before marriage. The subsequent birth of her child and its apparent age were necessary to lay a foundation for a safe judgment on that point. And therefore, although he appears to have been very negligent, yet, had he been more diligent, he might not have been able to make any proof of her conception before marriage. And had he been able to do so, it would have been of but little weight as evidence that she was a whore by merely, as might be presumed, anticipating with her betrothed husband, their approaching nuptials.

But, considering the apparent condition of the parties, a verdict for \$8,000 seems quite high, though perhaps not so flagrantly excessive as to indicate passion or prejudice in the jury. The slander, as charged, was exceedingly aggravated, and, without any other testimony than that alleged to have been discovered since the trial, there could be no semblance of justification, and at the utmost, the doubtful tendency of that single fact would but slightly mitigate. But as it might have, and probably would have, such an effect and the verdict might have been somewhat reduced by it had it appeared before the jury, we are inclined after careful and perplexing consideration, to think that, without any violation of principle or law, a new trial would do the appellees no wrong, and would afford a more satisfactory and assuring evidence of justice.

Wherefore, the judgment is reversed, and the cause remanded for a new trial.

Stanton & Throop, for appellant.

W. C. & F. F. Marshall, for appellees.

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W. H. BANDY v. EDWARD ROBERTS' ADMRS.

Action Against two Defendants—Summons served on One—Judgment.

In an action against two defendant, where one of them resided within the county, and upon whom personal service is had, the return upon the other summons being "not found," a judgment that the plaintiff "recover" of the defendant etc., is held to apply to the defendant upon whom the summons was served and not to both defendants.

Same—Continuance.

Though no order was made by the court as to the other defendant, not then served with process, the action would stand continued by operation of law.

APPEAL FROM MEADE CIRCUIT COURT.

October 12, 1868.

OPINION OF THE COURT BY JUDGE PETERS:

Two objections urged against the judgment only, need be noticed. The action was brought in the Meade circuit court by appellees against appellant, and one J. W. Brown on their joint note, the summons against both defendants was executed on Brown alone, and returned as to appellant not found. At the October term, 1866, of said court, a judgment was rendered as follows: "The defendant having been duly summoned, and failing to answer, it is adjudged by the court that the plaintiff recover *of the defendant* one hundred and one dollars and ninety cents, the amount claimed in the petition" with interest and costs, etc. And no order made continuing the case against the other defendant.

Afterwards a summons was issued directed to the sheriff, of Breckinridge county, and by him executed on appellant on the 18th of April, 1867. And at the following September term of the Meade circuit court, judgment was rendered against appellant by default.

The defendant Brown resided in Meade county, when the action was brought and the summons served on him there, the judgment rendered against the defendant, must be understood to apply to Brown upon whom the summons was served, especially as there is nothing in the judgment or any entry to repel that

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conclusion. *Clark, &c., vs. Finnell*, 16 B. Mon, 329-334. *Kountz vs. Brown, &c., Ib*, 585.

No order was made as to appellant on whom the summons had not been served; but the action was still pending against him, the court having rendered judgment against Brown, had the power and should have continued the action against appellant, and although no order seems to have been made to that effect, still the action stood continued by operation of law. *Sec. 108 and 399 Civ. Co., and Patton vs. Shanklin* 14 B. Mon. 15.

No error, therefore, prejudicial to appellant occurred in the proceedings or judgment. Wherefore, the judgment is *affirmed*.

Coale, for appellant.

Walker, for appellee.

CHARLES OBST v. H. KOHNHORST.**Judgment—Damages Assessed by Jury—Justice Court—Trespass.**

In an action for trespass, before a justice of the peace, a failure to have the damages assessed by a jury, will not make the judgment void, but voidable only.

Same—Appeal.

Such a judgment can only be corrected on appeal from the Justice Court to the proper tribunal, and not by objection in the Court of Appeals that judgment was void.

Jurisdiction of Justice Courts—Jefferson County.

An action for trespass *quare clausum fregit*, though by implication is an assertion of actual possession, does not come within the prohibition of the act of 4th of March 1866, Myers, Suppt. 575, regulating the jurisdiction of Justices of the Peace for Jefferson and Kenton counties.

APPEAL FROM JEFFERSON CIRCUIT COURT. COMMON PLEAS.

October 20, 1868.

OPINION OF THE COURT BY JUDGE ROBERTSON:

The appellee sued the appellant for \$99.50 before a justice of

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the peace of the city of Louisville, for trespass *quare clausum fregit* and recovered a judgment for the amount claimed in the warrant. On an appeal to the court of common pleas, the appellant failing to appear, that court affirmed the judgment of the justice, and this appeal seeks a reversal on two grounds: 1, That the justice's judgment was rendered without a jury. 2, That the justice had no jurisdiction, because the title to land might have been involved in the action.

Neither ground is available in this court.

1. Failing to have the damages assessed by a jury, though apparently erroneous, did not make the judgment void. And the only way to correct that error was by the appeal taken to the common pleas. But the error was waived in that court which properly affirmed the judgment under the authority of the 853rd section of the Code of Practice providing that "if the appellant fails to prosecute his appeal from the justice it shall be at the option of the appellee either to proceed to trial on the appeal or have judgment rendered for the amount of the original judgment or costs where it was in his favor." The elective judgment was accordingly rendered in this case; and it is now too late to object, for the first time, that the damages were assessed without a jury.

2. An act of the 4th of March, 1866 (Myer's Suppt. 575), gave to the justices of the peace for Jefferson and Kenton counties jurisdiction over *all common law actions* "regardless of the kind or nature of the action when the matter in controversy, or sued for, exclusive of interest or costs, does not exceed one hundred dollars, qualified only by the *proviso* that they shall not have jurisdiction in any case where the title to real estate is involved, or an action to enforce a mortgage or lien." The action in this case did not assert a title to real estate. By implication it asserted actual possession, but did not imply title to the clause intruded on. Apparently, therefore, title to real estate was not, by warrant or plea, involved. Consequently the amount claimed being less than \$100, the justice had jurisdiction.

Wherefore, the judgment of the common pleas court is affirmed.

Riley, for appellant.

Pope, for appellee.

J. D. ALLEN ET AL v. JAMES B. UPTON.

Depositions—Exceptions to—Waiver.

After exceptions to depositions have been sustained, the depositions withdrawn, and then by agreement of the parties, the plaintiff is permitted to read the depositions upon the trial of the cause, the objections are thereby waived, and cannot be available for reversal in the Court of Appeals.

Evidence—Irrelevant and Incompetent.

Though it be competent to prove by a witness what the laws of Congress are, and Government rights, if irrelevant and not pertinent to the issue, such evidence should be rejected on objection to same.

APPEAL FROM WARREN CIRCUIT COURT.

October 6, 1868.

OPINION OF THE COURT BY JUDGE PETERS:

A careful examination of this record has resulted in the conclusion that there is no substantial error in it available to appellants for a reversal.

Bowman was a defendant to the action, had a direct interest in behalf of himself in the issue and was therefore incompetent, *Sec. 670 Civ. Co.*

The law of the case in the instructions submitted to the jury by the court, was properly expounded, or perhaps it might with more propriety be said, that the law as submitted in the instructions to the jury was at least as favorable to appellants as they had a right to ask it, and they are not prejudiced thereby.

After exceptions to the deposition of Absalom Upton had been sustained by the court, the exceptions were withdrawn, and by agreement of the parties the plaintiff below was permitted to read the deposition of said Upton on the trial, so that whatever objections there might have been to the deposition, they were waived, and cannot be available now in this court for reversal.

As to the objection made to Hobson's evidence, he stated what the army regulations were in relation to substitutes, with which he stated he was familiar, and from his connection with the army he must have been, and no sufficient reason is shown, and none

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is perceived why he was not competent to prove them, and besides he read the orders on the subject agreeing with his statement, which were read without objection; it is true after they were read appellants excepted to them as incompetent; but that was not sufficient, the objection should have been made when the orders were offered, as has been repeatedly held by this court.

The objection of plaintiff to the interrogatories propounded by appellants to Hobson were properly sustained by the court for even if it were competent to prove by the witness what the Government had a right to do and thereby prove what a law of Congress is by the witness, the evidence was irrelevant and not pertinent to the issue, and was properly rejected on that account.

Upon the subject of the verdict being contrary to the evidence it need only to be said that the evidence was conflicting and if it did not preponderate on the side of the verdict; the finding of the jury cannot be regarded as palpably against the evidence, and this court has no power to interpose.

No error is perceived prejudicial to appellants.

Wherefore, the judgment is *affirmed*.

Harney, for appellant.

Rodman, for appellee.

JAMES H. WHITE ET AL V. JAMES G. BAYNE.**Appeal and Error—Continuance of Cause.**

The question of whether in a joint suit against executors, and the same parties as individuals, the court below should dismiss the cause as against them as executors, cannot be raised in the Appellate Court on appeal by them in their individual capacity, no judgment having been rendered against them as executors below.

Pleading—Answer—Trial.

Where an answer has been filed at the first term of court after summons, and the plaintiff does not consent that the statements of the answer might be taken as true, he is not entitled to a trial at that term, if the issue of fact is made by the answer.

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Same— Issues—Available Defense.

A petition charges a sale of lands by a defendant, for the purpose of defrauding creditors, that they were insolvent, and the sale was not a bona fide one, and that the purchaser knew of the existence of the debt at the time, to which the defendants answered, denying the sale made to defraud creditors, or with fraudulent intent, but that the sale was bona fide and for a valuable consideration: Held to be an available defense, though the answer did not controvert the allegations of insolvency, and knowledge of the purchaser as to same.

Same.

The mere knowledge by the vendee of the insolvency and indebtedness by the vendors to the plaintiff would not alone invalidate the transactions.

APPEAL FROM SHELBY CIRCUIT COURT.

October 2, 1868.

OPINION OF THE COURT BY JUDGE HARDIN:

Cary White died in 1864, leaving a will by which he devised a portion of his estate to his wife Anna White, for life, and the remainder therein, together with all the residue of his estate, to his two sons James H. White and John W. White, whom he named as his executors, with an expression of his wish that they should qualify without giving bond as such; and they did so qualify as executors.

Afterwards, the appellee, James G. Bayne, being the holder of a note for \$1,750 executed to him, by said James H., John W. and Cary White, payable the 14th day of May, 1864, and credited by the interest thereon up to the 14th of August, 1865, and also by \$1,140 paid on the 11th day of December, 1866, brought this suit in equity against said James H., John W. and Anna White, alleging the unpaid balance of his debt, and the death of Cary White, and the appointment and qualification of his executors. He also exhibited the will of said decedent, and charged that the devisees James H. and John W. White received under it a tract of about 300 acres of land, subject to said Anna White's estate for life in one-third of it. He further charged that said James H. and John W. White were insolvent, and that they had made a fraudulent sale of the land devised to them, to said Anna White, who was then claiming it as a purchaser from them, and that said sale was not a *bona fide* sale and trans-

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fer of the land, but was made with the fraudulent intent to prevent the land from being subjected to the payment of the debts of said James H. and John W. White. The plaintiff further alleged that said Anna White knew of the existence of his debt, and that the land was liable for it, and knew also of the insolvency of J. H. and J. W. White, to whom she had not paid a valuable consideration for the land, and that the whole transaction was a fraud upon their creditors.

The petition contained a prayer for judgment against said J. H. and J. W. White individually and as executors of Cary White, and that said sale and transfer from them to Anna White be set aside, and so much of the land which was devised to said J. H. and J. W. White as necessary to pay the debt be sold for that purpose.

To this action the following answer was filed by the defendants on the 28th of September, 1867:

“Defendants deny that the sale of land made by defendants to Anna White, as referred to in plaintiff’s petition, was made to defraud creditors of defendants, or with any fraudulent intent whatever, but that said sale was *bona fide* and made for a valuable consideration.

“Defendants further deny that any demand was made upon them as executors of Cary White accompanied by the certificate and affidavits as required by law before the institution of said action against them.”

And at the same term of the court, on the 1st of October, 1867, the court, on motion of the plaintiff, ordered that the “cause be submitted for a decree,” and on the 11th of October, 1867, a judgment was rendered against J. H. White and J. W. White individually for the plaintiff’s debt; and so much of the cause was continued as sought a recovery against them as executors of Cary White, and the court adjudged a sale of so much of the land as necessary to pay the debt and costs; and from that judgment this appeal is prosecuted.

Whether or not the court should have dismissed the action as to the defendants J. H. and J. W. White in their capacity as executors of Cary White, on the mere suggestions in the answer that the plaintiff had not made the demand required by law, without any rule or motion, based on that ground, is not a question proper-

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ly before this court on this appeal, as no judgment was rendered on that branch of the case.

The appellants complain of the judgment on several other grounds, on one of which, at least, it seems to us the judgment is erroneous, and must be reversed. The appellants filed their answer at the first term after the service of the summons upon them, and as the plaintiff did not consent that the statements of the answer might be taken as true, he was not entitled to a trial at that term, according to section 395 of the Civil Code, if an issue of fact was made by the answer (*Grant and Wife v. Smedley*, 1 Duvall, 358). It may be conceded as true, as is insisted for the appellee, that if the answer did not sufficiently controvert the averments of the petition, nor state facts constituting a defense, the court might have disregarded it as making no sufficient issue to be tried, but although, as suggested for the appellee, the answer does not controvert the allegations, that when the sale was made to Mrs. White by J. H. and J. W. White they were insolvent and so known to be by her, and that she also knew of the existence of the plaintiff's debt, yet as the answer denies that said sale was made to defraud the creditors of said J. H. and J. W. White, or with any fraudulent intent whatever, and alleges moreover, that the sale was *bona fide* and made for a valuable consideration, we think it presented an available defense. For if it be true that the sale was made as alleged in the answer, *bona fide* and for a valuable consideration, and not to defraud creditors, or with any fraudulent intent whatever, a mere knowledge on the part of Mrs. White that the vendors were insolvent and indebted to the plaintiff, would not alone invalidate the transaction. Such knowledge and insolvency may have existed consistently with an honest purpose to apply the proceeds of the land when sold to the payment of debts, and we are not authorized to infer from them alone the existence of a fraudulent purpose in opposition to the express denials of the answer.

Wherefore, the judgment is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Stanley & Roberts, for appellants.

Harwood, for appellee.

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SAMUEL H. MERRILL, *v.* C. J. TAYLOR ET AL.

Bills and Notes—Co-Sureties—Presumptive Notice.

C. J. Taylor and Merrill were principals in a note given by them for borrowed money while they were partners in business. A new note was given by them in lieu of the old one, signed C. J. Taylor, and Merrill "surety." S. P. and J. G. Taylor also signed the last note as sureties: Held, that the word "surety" after the name of Merrill may have been presumptive notice to the other parties, of the character in which he assumed to bind himself, this would not make him the co-surety of S. P. and J. G. Taylor unless he had ceased to stand, as between him and C. J. Taylor, in the attitude of principal in the original debt.

Same.

The evidence showed that on the dissolution of the partnership, C. J. Taylor undertook to collect the means of the firm and out of that, pay the debts. This would not change the character of Merrills responsibility from principal to surety. Until this agreement was fully carried out, the obligations were the debt of both.

APPEAL FROM ADAIR CIRCUIT COURT.

October 6, 1868.

OPINION OF THE COURT BY JUDGE HARDIN:

The trustees of the Zion Baptist Church in Adair county held a note on the appellant S. H. Merrill, and C. J. Taylor for money which they borrowed as partners when engaged as such in the business of merchandising. The debt appears to have amounted to \$920 on the 20th of March, 1860, when a new note was given for the same consideration signed by said C. J. Taylor, and by said S. H. Merrill, with the word "surety" affixed to his signature, and signed also by the appellees S. P. Taylor and J. G. Taylor. A judgment having been obtained on the last named note C. J. Taylor paid \$587.25 on the debt and Merrill paid the balance of \$670.40 and took an assignment from the plaintiffs' attorney of the benefit of the balance of the judgment so satisfied by him, and sued out an execution to coerce payment from his co-defendants in the judgment.

This suit in equity was brought by said C. J. Taylor, S. P.

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Taylor and J. G. Taylor to enjoin the collection of the judgment and execution assigned, on the alleged ground that Merrill was jointly bound with C. J. Taylor as the principal obligor in the debt, and that S. P. Taylor and J. G. Taylor were only sureties in the debt for both C. J. Taylor and Merrill, and that said sum of \$587.25 was when paid by Taylor his equal half of the debt exclusive of sheriff's commissions which he also paid thereon.

These and other averments of the petition, and the answer of the defendant, presented the questions, 1st, whether or not C. J. Taylor was alone the principal obligor in the debt and Merrill and S. P. Taylor and J. G. Taylor were alike his sureties, and, 2nd, whether as between C. J. Taylor and Merrill an agreement existed by which the latter was bound to pay the entire debt although both were principals so far as the other obligors were concerned.

The court on hearing the cause seems to have been of the opinion that S. P. Taylor and J. G. Taylor were sureties of both Merrill and C. J. Taylor, but that as between the latter, Taylor was bound by an agreement to pay the debt in consideration of the partnership means and assets left in his hands as alleged by Merrill, and accordingly the court perpetuated the injunction in favor of S. P. Taylor and J. G. Taylor, but dissolved it as to C. J. Taylor and dismissed the petition as to him but without prejudice to his right to have a settlement of the partnership.

And from that judgment Merrill has appealed to this court.

It is not controverted that C. J. Taylor and Merrill were principals in the debt until its removal on the 20th of March, 1860. Neither is it controverted that they were partners when the original debt was created; and although when the last note was given, Merrill professed to execute it as surety for C. J. Taylor and affixed the word "surety" to his signature, which may have been presumptive notice to the parties who subsequently signed the note of the character in which he assumed to bind himself thereby, these facts did not make him the co-surety of S. P. and J. G. Taylor, unless he had ceased to stand, as between him and C. J. Taylor, in the attitude of a principal in the original debt. The averments of his answer, so far as Miller's testimony goes to sustain them, are in effect that on the dissolution of the co-partnership, C. J. Taylor undertook to collect the means of the firm and out of funds so to be realized to pay the debts. This did not change the character of Merrill's responsibility from principal to

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surety in the debts, nor divest him of his interest in firm assets remaining in his partner's hands, but was simply an agreement by which when fully carried out he might be relieved of responsibility for the debts, and until so relieved, the debts were his own as well as Taylor's.

It seems to us the circuit court construed the transaction as between the original debtors, and S. P. and J. G. Taylor, and held the latter two to be the sureties of both the others, and therefore properly perpetuated their injunction. As C. J. Taylor has not appealed from the judgment, we do not decide whether the court did not properly regard Merrill as a surety as between them; he having signed the note as surety—with C. J. Taylor's knowledge.

Wherefore, the judgment is affirmed.

Bramblett & Son, Winfrey, for appellant.

Baker, for appellees.

JAMES A. GRIDLEY ET AL v SUSAN A. CRAIGG ET AL.

Adverse Possession—Thirty Years Occupancy—Paper Title not Necessary.

A claimant of land under a senior patent who has been in possession constructively for more than thirty years, is not required to show actual record title, in defense of his claim.

Evidence—Arbitrators Award Competent Testimony.

In a suit between two claimants for land, where the vendor, under whom plaintiffs claim, accepted a deed to and asserted title to the land, recognizing the boundary as fixed by arbitrators, such an award is held to be competent evidence to establish title.

Lands and Conveyances—Adverse Possession—Boundaries.

The possession of land under an older patent, constructively puts the party in possession, up to the patent boundaries, which constructive possession cannot subsequently be ousted under a junior patent only by actual enclosed possession.

APPEAL FROM GALLATIN CIRCUIT COURT.

September 11, 1868.

Opinion of the Court.

OPINION OF THE COURT BY JUDGE WILLIAMS:

Appellees claiming to be heirs, devisees, &c., of William Craigg, deceased, and claiming under him and under a patent to Adams Stevens, dated June 16, 1780, brought this suit to recover a specified boundary of land of some 80 acres.

A patent issued May 27, 1786, to Littleberry Mosely, under which appellants claim.

The two patents seem to call for the same trees, timber, &c., on the Ohio river, but from said corner the elder patent calls to run south 22, east 180 poles, whilst the junior patent calls to run thence south 10, east 510 poles, the land in controversy being that between these two conflicting lines when run according to the patent calls.

Appellees and those under whom they claim have had actual possession of the Steven's survey at least since the year 1817, and Thomas Craigg who first entered on it claimed even above the line running from the Buckeye corner, common to both surveys, south 22, east, and this caused a suit between him and Abejak North which resulted in North's favor and limited Craigg's claim to said line, but this was not the land now in controversy, as it lays below said line.

As early as the year 1824, a suit was pending between Thomas Craigg and Wade Mosely as to the boundary of these Stevens and Mosely surveys and was referred to the arbitrament of Henry Davidge and Samuel Todd who on November 16, 1824, awarded that the Stevens survey should run south 22 east from the said Buckeye corner, and that Mosely surrendered the land up to said line and pay his costs, which was made the judgment of the court. And on the sixth of the following December Abejak North accepted from R. H. L. Mosely as agent of Wade Mosely, a deed for the land claimed by him, in which the line as established by said arbitrators was recognized and called for as a boundary. Gridley claims under North. There is no title paper connecting appellees with the patentee Stevens, nor is this supplied by the other evidence. Nor is the appellant by paper title or other evidence connected with the patentee Littleberry Mosely. This suit was brought in the year 1863, therefore more than thirty years possession was made out by appellees and those under whom they claim, under the Stevens patent, hence they are entitled to

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the benefit of that patent without connecting themselves by paper title with it.

As Abijak North, under whom appellants claim, asserted title under Wade Mosely and accepted a deed from him recognizing the line fixed by the arbitrators in the suit between him and Thomas Craigg, we regard said award and the judgment of court thereon as competent evidence, especially under the issue in this case. Plaintiffs set out with particular precision the abutals of the land claimed by them and for which they sued, averring title in themselves, defendants in their answer simply controvert the title of said land being in the plaintiffs, but aver that it is in them, no issue as to the abutals of the land in controversy is made, but simply the title.

There seems to be no conflicting evidence as to this land being within the calls of the Stevens patent, hence, instruction No. 9 asked by appellant and refused by the court was merely abstract.

The evidence authorized the jury to believe that the line south 22 east from the Buckeye corner, on the Ohio river, had been recognized and acted on as the boundary between the Stevens and Mosely surveys by those in possession and claiming the land under the respective patents down to within some six or eight years before the bringing of this suit.

The will of Thomas Craigg to his son Willis Craigg, the testator of appellees, is not in the record, but Thomas Ross proves the devise to Willis and his brother Frank and their subsequent division which was not objected to and is amply sufficient, at least after verdict.

Thomas Craigg's deed from Alex Stevens is dated as far back as the year 1806, and connected with his long possession and those claiming under him and after the records of this court, where a deed from Adam Stevens to him may have been recorded, has been twice destroyed by fire, it would be unreasonable to require documentary evidence of title.

The possession under an elder patent constructively puts the party in possession up to the patent boundaries, which constructive possession cannot subsequently be ousted under a junior patent only by actual enclosed adverse possession. There is no such thing as constructive subsequent adverse possession under a junior patent to the previous constructive possession under an elder patent.

Opinion of the Court.

We see no error in granting or refusing instructions, wherefore, the judgment of recovery is affirmed.

Stevenson & Myers, Winslow, for appellants.

Landram, Scott, for appellees.

DAVID N. WILLIAMS v. JOHN A. CARTER & BROTHER.

Sale of Brandy—Acceptance of Proceeds, Though Sale Unauthorized—Waiver

Brandy, which had been ordered by the owner to be shipped to him, but sold instead, and a statement of account rendered, with the sale price of the brandy entered thereon, and not objected to, cannot be claimed on account of non-delivery, or an advance later in price. The acceptance of the bill of sale, will be held to be a confirmation and waiver of any claim for non-shipment.

APPEAL FROM JEFFERSON CIRCUIT COURT, C. P.

September 18, 1868.

OPINION OF THE COURT BY JUDGE PETERS:

The brandy, which is the subject of this controversy, was sold the latter part of June, 1862, and this action was not brought till the 29th of June, 1865, three years after the sale, which would seem to be an acquiescence in the disposition of it, although appellant had just before the sale ordered it to be shipped to him; moreover in his letter under date of July 3rd, 1862, he wrote to appellees for an account of the sales, and a statement of the balance of his indebtedness to them, after the credit of the price of the brandy was entered, which he promised to arrange, and did pay shortly thereafter without objecting to the sale, or claiming to be entitled to a greater credit for the brandy, than the price for which it was reported to him to have been sold, this acceptance of the credit for the proceeds was a confirmation of the sale, and a waiver of any claim he might otherwise have had against appellees for a failure to ship the brandy to him, according to instructions, or an unauthorized sale of it.

Opinion of the Court.

Again no bill of exceptions is presented in the record, and this court cannot assume that the judgment was unauthorized by the evidence.

No errors are pointed out or perceived in the determination of any legal proposition involved.

Wherefore, the judgment is *affirmed*.

James, for appellant.

Gibson, for appellee.

WILLIAM S. GREEN v. BERIAH MCGOFFIN.

Option of Purchase—Right of Holder to Rescind.

One who directs an investment in a speculative enterprise must elect the option of purchase within a reasonable time. The conventional reservation of an option to reject the purchase cannot be reasonably interpreted so as to allow him an indefinite time to accept, which would give him the unjust advantage of holding the interest so long as it was in value, and repudiate it if it should depreciate.

APPEAL FROM JEFFERSON CIRCUIT COURT. CHY.

September 26, 1868.

OPINION OF THE COURT BY JUDGE ROBERTSON:

McGoffin having vested the \$2,500 in the purchase of 1-36th of LaCrescent City and had the right transferred to Green on the books kept for that purpose by the company of stockholders, thereby fulfilled the trust he had undertaken to make on investment. Green, when notified of the investment as made, seemed to approve it and, though for more than a year after such notification he could have sold his interest for considerably more than cost, he preferred to retain it as an excellent speculation. After all this it was too late for him to renounce the investment and claim a restitution of the \$2,500. The conventional reservation of an option to do so cannot be reasonably interpreted so as to

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allow him an indefinite time for an election which would have given him the unjust advantage of holding the interest as long as it rose in value and the right to repudiate it if it should ever become worthless or depreciated below par. He had a right to elect at any time before confirmation. But after he chose to approve his *locus in quo* was gone.

Consequently having attempted repudiation too late he has no right to enforce restitution.

Wherefore, the judgment dismissing his petition is affirmed.

Barrett & Roberts, for appellant.

Bullitt, for appellee.

J. R. PHILLIPS v. R. CHRISTMAS.

Bill of Exceptions—Filing of Same—Nunc Pro Tunc.

A bill of exceptions, filed some four months after an order of court granting leave to file same October 26, 1867, and "time until Saturday next is given to file a bill of exceptions," on February 29, 1868, leave is given to "withdraw bill of exceptions filed in case No. 1703, and file in this case," and again on March 7, the court granted leave to file same "in this case nunc pro tunc as of November 1867," is held to be two late under any view of the case.

APPEAL FROM JEFFERSON CIRCUIT COURT. *C. P.*

September 23, 1868.

OPINION OF THE COURT BY JUDGE WILLIAMS:

There is no possible right in which the bill of exception, containing the evidence in this case can be regarded consistent with the Code of Practice and the adjudications of this court. The motion for a new trial was overruled October 26, 1867, and "time until Saturday next is given him to file bill of exceptions." February 29th, more than four months afterwards, appellant moved for leave to withdraw the bill of exceptions filed in case No. 1703 and file it in this case. March 7th, the court granted leave to file the bill of exceptions, which had been im-

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properly filed in No. 1703 "in this case *Nunc pro tunc* as of November, 1867."

So that even this nunc pro tunc filing was 28 days too late under any view of the case. It is not however intended to decide the validity of such order had it been filed as of the right time. There being no bill of exceptions no other question can be adjudicated. Wherefore, the judgment is affirmed with damage.

Wood & Bernard, for appellants.

Bodley & Simrall, for appellee.

M. S. HANCOCK'S ADME. v. C. F. SANDIFER ET AL.

Lien—Attachments—Return by Clerk to Wrong Court.

Lewis & Co., having their execution returned, no property found, filed their petition in equity and by attachment, enjoined the payment to their debtor of moneys due by Hancock & Co. The clerk made the return to the March called special term of court, instead of the regular June term. This process was returned executed by the sheriff April 25, and subsequently the debtor was proceeded against as a non-resident:

Held, that a lien was created by the attachment, prior to other creditors whose liens were filed subsequent to the filing by Lewis & Co.

Attachment—Garnishment—Allowance for Attorneys Fee.

No attorneys fee can be adjudged against a garnishee, who, in order to protect their interest, petitions the court to cause all creditors seeking attachments, to interplead in any one action against them.

Equitable Proceeding—Judgment—Execution—Return of Nulla Bona—No Bond Required.

In an equitable action on a judgment and return thereon of nulla bona, against a garnishee, no affidavit or attachment is necessary.

Garnishee—Not Liable for Costs.

Unless a garnishee resists the claim against them in an equitable action by attachment, no costs can be recovered against him, especially where the litigation is prolonged by the negligence of the attaching creditors.

Opinion of the Court.

September 27, 1868.

OPINION OF THE COURT BY JUDGE WILLIAMS:

A. Lewis & Co. having a return of no property found on execution against G. W. Spenny, filed their petition in equity under section 474 Civil Code, averring their judgment and return of *nulla bona* and that Hancock & Co. owed by judgment some \$350 and prayed that they be enjoined from paying over any part thereof to Spenny, and that it be appropriated to the payment of their said judgment against him, the object of said suit was also endorsed upon the summons as authorized by section 477 Civil Code.

Subsequently Sandifer filed his petition alleging debts against Spenny enjoining Hancock & Co. from paying over to him also attaching the debt.

Lewis & Co. had process to a different county against Spenny, which the clerk erroneously made returnable to the March called special term of the court instead of to the regular June term fixed by law, this process was returned executed by the sheriff April 25, after the return day. Subsequently Spenny was proceeded against as a non-resident.

Sandifer had actual service against Spenny.

The court adjudged an appropriation of Spenny's judgment against Hancock & Co. or a sufficiency to Lewis & Co. after which Hancock & Co. becoming fearful that they might be compelled also to pay Sandifer as his case remained undisposed of, filed their petition against Spenny, Lewis & Co. and Sandifer asking that they be compelled to interplead, that the court adjudge who had the prior lien, and for a temporary injunction until these matters were settled.

The court on final hearing erroneously adjudged that Lewis & Co. got no lien by their equitable proceeding and that Sandifer did, consequently, had priority and appropriated a sufficiency of Spenny's judgment against Hancock & Co. first to pay Sandifer and then the remainder to Lewis & Co. and perpetually enjoined Lewis & Co. from collecting their first judgment against Hancock & Co. notwithstanding which the court allowed to Lewis & Co. an attorney fee of fifty dollars to be taxed as costs against Hancock & Co. making them pay the costs of their successful litigation, from which they have justly appealed.

Opinion of the Court.

Whether or not the service of the process in Lewis & Co.'s favor against Spenny on the summons erroneously returnable to a special called term of the court not recognized by law should be deemed actual service and whether before pronouncing any judgment for Lewis & Co. against Hancock & Co. a bond as provided by section 440 Civil Code should have been executed to Spenny cannot now be adjudicated by this court, because these matters can only be brought here by an appeal from that judgment or by proceeding to open the judgment as provided in behalf of non-residents in section 445 Civil Code. Until reversed or opened and retried said judgment must be regarded as still in force. Unless for equitable reasons a perpetual injunction should be permitted to stand. Lewis & Co. obtained a lien by virtue of their equitable proceedings and service of summons with the object of the suit endorsed thereon upon Hancock & Co. by virtue of section 477, nor was an affidavit of attachment bond necessary to such proceedings as provided by section 476, this remedy upon judgment and return of *nulla bona* being specially provided for.

Had the court required Hancock & Co. to pay the money owing by them to Spenny into court they would have been exonerated from all liability to him as provided by section 244, but no such order was made. The garnishee can only be subjected to costs upon his resistance of the claim.

Hancock & Co. returned endorsed upon the summons in both Lewis & Co. and Sandifer's case that they owed the judgment which Spenny had recovered against them; therefore, making no resistance were not liable for costs, and as this litigation was necessitated by the negligence of the attaching creditors, are not liable for costs in it, and for this error the judgment for costs against them must be reversed.

The perpetual injunction in their favor against Lewis & Co. was also erroneous for the reasons herein assigned, and it must be reversed on their cross appeal.

Wherefore, the judgment is reversed, both on the appeal and the cross appeal of Lewis & Co., with directions for further proceedings consistent herewith. Neither party will be allowed costs against the other.

Cissell & Vance, for appellant.
Yeaman, for appellees.

Opinion of the Court.

. THOMAS BRADFORD, ADMR., ET AL V. LLOYD W. KIRBY ET AL.

Lands and Conveyances—Sale to Son by Father—Unpaid Purchase Price—Distribution.

A sale of land by father to son, for a consideration, only a small portion of which is ever paid by the son, is held to inure to the benefit of all the heirs less an advancement to him, equal in proportion to that each of the other children may have received.

Deeds—Acknowledgement of Payment of Purchase Price not Conclusive.

The acknowledgement of payment in a deed of conveyance cannot be held to be conclusive, but is subject to be rebutted.

Parent and Child—Contract of Child to Support his Parents—Consideration.

A conveyance by a father to his son of a valuable estate in consideration of his giving them a support, cannot be enquired into by the other children after the death of the parent, no complaint by them nor the other heirs, having been made during the life of the parents.

Same—Fraud and Undue Influence.

Nor can a plea of fraud and undue influence be substantiated, after submitting for more than eighteen years, whilst the son was supporting his parents: After their demise, the heirs should not be permitted to attempt the vindication of their injured parents' rights, when too late to do them any good, and when all the benefits would inure to them.

Gifts—Parent and Child—Advancements.

In a suit for restitution by some of the heirs against a son, for distribution of property placed in his hands by the father, each of the heirs is held entitled to an advancement equal to the largest amount made any one of them during the life of the parent, to be first paid to them out of the whole estate.

APPEAL FROM PENDLETON CIRCUIT COURT.

September 10, 1868.

OPINION OF THE COURT BY JUDGE WILLIAMS:

September 17, 1842, the decedent, then far advanced in life, conveyed his tract of land of 200 acres in Pendleton county, to his son, said Lloyd W. Kirby, reciting a consideration of \$1,000 paid. And by deed dated one day thereafter he conveyed to said

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Lloyd his slave girl then about 18 years old and all his personal property, consisting of several horses, cattle, corn, hay, &c., then on hand, and growing crop, reciting a consideration of one thousand dollars paid, and a covenant on the part of Lloyd to support the vendor and his wife during life, they being his parents.

Lloyd W. Kirby was a young man then about arriving at majority and single, living with his parents, possessed of but little, if any, property, and perhaps no cash means, for even the small debts he paid for his father were permitted to run some of them for several years and coerced by legal process.

The old man had advanced his two older sons and married daughter, but his youngest daughters, one of whom were still unmarried, and Lloyd had not been advanced.

Lloyd W. Kirby attempts to explain how he paid the valuable consideration set out in the two deeds, but has only shown a few hundred dollars so paid, even considering the notes exhibited by him as his father's obligations to others of subsequent date to said deed. His mother lived some nine years after the execution of those deeds and his father some eighteen.

In the year 1864, Bradford, as administrator, and those children who had not been advanced, filed this suit setting up fraud and undue influence on the part of the vendee over the vendor, and that also that Lloyd had executed an obligation to convey the slave and her increase at the death of his parents to his unadvanced sisters, and pay them each \$100. All of which he controverted in his answer. The court having dismissed the suit, the plaintiffs appeal.

We think the attempt to show that Lloyd did not support his father and mother according to his contract and duty come abortively too late after both parents are dead, and no complaint by them in their life time, nor on the part of the other children; filial affection during the parents life should have inspired an interposition on the children's part rather than a desire for gain since their death.

Nor can the plea of fraud and undue influence be more favorably regarded, after submitting for more than eighteen years, whilst Lloyd was supporting his parents; when nature has removed this burden from his shoulders, they should not now be permitted to attempt the vindication of their injured parents' rights, when too late to do them any good, and when all the benefits must inure to the plaintiffs.

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But it is apparent from the deed that James Kirby did not intend the land as a gift to his son, but conveyed it for the valuable consideration of one thousand dollars, nor did he intend to convey all his personalty to his son for the payment of the Southgate debt on the support of himself and wife, but for a valuable consideration beside of \$1,000, the deed *express* payment in full, but it is just as apparent that this consideration of one thousand dollars in each deed never has been paid; Lloyd was not able to pay it, never did pay it, but if he did he got it again from his father as he was virtually his father's custodian, his father lived with him and he controlled the old man.

There is a strong and perceptible reason why the old man should desire to retain two thousand dollars, or thereabouts, that his unprovided for daughters should have something like an equal advancement with his other children.

The tract of land and personalty after paying the Southgate debt, supporting the old people and paying the two thousand dollars would make Lloyd an advancement equal to any of the other children, hence the old man's desire to have two thousand dollars as a valuable consideration, he then owed only a few small debts amounting at most to but a few hundred dollars, he must have known that his personalty was much more than ample to pay these.

If there was any writing executed to him by Lloyd it has been doubtless lost or misplaced; a lapse of eighteen years under the circumstances afforded ample opportunity for this, but it is probable none was executed, as the consideration set out in the deed was likely deemed by him sufficient for this purpose.

The acknowledgement of payment in a deed of conveyance has never been held conclusive, but subject to be rebutted, and its payment is rebutted in this case.

The property at the time conveyed, was worth near six thousand dollars, therefore, after payment of two thousand dollars and retaining one thousand dollars for an equal advancement, Lloyd would get some three thousand dollars for the support of his parents, and this too in advance, and beside be entitled to their aid.

This specific view was not presented to the court, but the petition denies the payment of the consideration and prays for general relief.

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Lloyd attempted to account for the payment of the consideration, but mainly failed, only showing at best the payment of a few hundred dollars.

When the unpaid part of this two thousand dollars is collected from Lloyd the administrator must distribute it according to law, first paying those who have not been advanced equally with those who have, and Lloyd should be deemed as having an advancement equal to the most favored of his brothers and sisters.

As the relation between Lloyd and his father, when the nature and objects of the conveyances are considered, should be regarded as that of high confidence and of trustee for him and his unadvanced children, though not strictly legally so, yet no statute of limitations or other limitations should obstruct the collection of this debt.

Wherefore, the judgment dismissing appellant's petition is reversed, with directions to the court below to refer the case to a master to ascertain how much of the consideration set out in said deeds of one thousand dollars each has been paid, and to permit either party to introduce further evidence as to their point, and to adjudge against Lloyd W. Kirby any unpaid balance.

Ireland & Duncan, for appellants.

Records, for appellees.

JOSEPH CHIPMAN v. N. D. SHANE.

Contracts for Purchase of Personal Property—Rescission for Fraud—Tender.

It being the duty of a vendor of a horse, to disclose to a purchaser its true condition, when asked as to the soundness, and the vendee, upon discovering the fraud and misrepresentation, made a tender of the horse and money back, the vendor cannot be held to complain of an enforced rescission of the contract.

APPEAL FROM BRACKEN CIRCUIT COURT.

June 22, 1868.

The instructions referred to in the opinion of the court are as follows, to wit:

Opinion of the Court.

For plaintiff: "If the jury believe from all the evidence in this cause that the plaintiff and defendant traded horses and each delivered to the other the animals so traded, and that the defendant, without the knowledge and consent of plaintiff, took from the possession of plaintiff his mare, then they will find for plaintiff, and in their verdict ascertain and fix the amount claimed in the petition."

Refused for defendant: "If the jury believe from all the evidence that the plaintiff and defendant traded horses, and plaintiff at the time of the trade fraudulently represented the horse to be sound and a good plow horse to defendant, he knowing him to be unsound and incapable of doing good service as a plow horse, and the horse was unsound and not a good plow horse, and defendant tendered back the horse and money in a reasonable time, he had a right to reclaim his mare, and they must find for defendant."

From a verdict and judgment for plaintiff, defendant appeals.

OPINION OF THE COURT BY JUDGE PETERS:

If it were not the duty of appellee to disclose to the appellant the true condition of the horse which he exchanged with him for the mare, knowing, as he did, that he was unsound, and of no value, he is without legal excuse for affirming, when appellant asked him if he was a good plow horse, that he was. He was weak in the back, or loins as the evidence shows, and could not be used, as a plow horse, nor for any other service, on that account. For the misrepresentation, and fraud therefore of appellee, appellant was entitled to a rescission of the contract, having tendered the horse and money back so soon as he discovered the fraud. Consequently the instruction which was given on motion of appellee, was erroneous. And the one asked by appellant should have been given.

Wherefore, the judgment is *reversed*, and the cause remanded with directions to set aside the verdict, and award a new trial, and for further proceedings not inconsistent with this opinion.

Menzies and Furber, for appellant.

J. B. ALEXANDER & CO. v. WARREN TOBIN.**Instructions— Action on Open Account.**

In a suit against the firm of Alexander & Co., for the proceeds of the sale of tobacco, their correspondent having remitted the proceeds to the credit of the firm of Jo. B. Alexander & Co., of the same town, an instruction "that any one or more of the members of said firm of Alexander & Co., had a right to direct the mode of transmitting the proceeds of the tobacco to them, and if Kirkpatrick & Co., in good faith transmitted the proceeds to their correspondent, believing the letters from Jo. B. Alexander & Co., was the firm of Alexander & Co., without knowledge that there were two firms different in their constituent members, the transmission would bind all," is held to be a proper construction of the law.

Same.

And the following instruction was properly refused; "that a payment by Kirkpatrick & Co., on the order of Jo. B. Alexander & Co., did not bind the firm of Alexander & Co., although such order was understood and acted upon by Kirkpatrick & Co., as the order of Alexander & Co., of whom said Jo. B. Alexander and Baker were members."

December 1, 1868.

OPINION OF THE COURT BY JUDGE HARDIN :**APPEAL FROM CUMBERLAND CIRCUIT COURT.**

There were two firms in business at Burksville, Kentucky, in which J. B. Alexander was a partner. One of them was the firm of Alexander & Co., dealers in tobacco, composed of said J. B. Alexander, R. E. Cross, J. M. Boles and G. F. Baker; and the other was composed of said J. B. Alexander and G. F. Baker, retail dry goods merchants, doing business in the name and style of J. B. Alexander & Co.

This action was brought by the appellee against said firm of Alexander & Co., for the sum of \$176.67, proceeds of two hogsheads of tobacco forwarded by the defendants for the plaintiff to New Orleans for sale and there sold by Kirkpatrick & Co., commission merchants, who as directed by a letter signed "Jo. B. Alexander & Co.," dated at Burksville, Ky., July 20, 1862, placed

Opinion of the Court.

the sum to their credit with Messrs. W. P. Converse Tyler & Co., New York.

A trial of the case resulted in a verdict and judgment for the plaintiff, from which this appeal is prosecuted.

The court instructed the jury that any one or more of the members of said firm of Alexander & Co. had a right to direct the mode of transmitting the proceeds of the tobacco to them, and if Kirkpatrick & Co. in good faith transmitted the proceeds of the tobacco to Converse Tyler & Co. believing that the letters of Jo B. Alexander & Co. were from the firm of Alexander & Co. and without knowledge that there were two firms different in their constituent members, the transmission of the proceeds to Converse Tyler & Co. would bind all the defendants.

And the court refused to give the jury several instructions to the effect that a payment by Kirkpatrick & Co., on the order of Jo Alexander & Co., did not bind the firm of Alexander & Co., although such order was understood and acted upon by Kirkpatrick & Co., as the order of Alexander & Co. of whom said Jo B. Alexander and Baker were members.

Whether these rulings were correct or not is the principal question to be determined on this appeal.

It seems to us the ruling of the court was not erroneous. It cannot be controverted that any one of the firm of Alexander & Co., might bind his associates by directing the manner of remitting or disposing of the proceeds of the tobacco, and if the letter to Kirkpatrick & Co. was written by a member of that firm, although not precisely in the firm name, yet so as to be understood and acted upon by Kirkpatrick & Co. as the authoritative order of Alexander & Co., and they did so understand and act upon it, such authority was sufficient to bind said firm of Alexander & Co. as if given in their proper name.

Wherefore, the judgment is affirmed.

Bramblett & Son, for appellant.

James, for appellee.

F. M. HUGHES v. JACOB LEIBER.**Wills—Estate in Fee Simple.**

A will conveying an estate to a wife "and the heirs of her body," constructively imports a fee simple title in her, and a purchaser from her will hold a fee simple interest indefeasable by her issue.

APPEAL FROM OLDHAM CIRCUIT COURT.

October 16., 1868.

OPINION OF THE COURT BY JUDGE ROBERTSON:

Bulware's will and the conveyance by Price to Mrs. Griffith, and "the heirs of her body," pursuant to that will, constructively import a fee simple title in her. And consequently the purchaser of her title will hold a fee simple interest indefeasable by her issue.

The judgment of the circuit court is therefore affirmed.

DeHaven, for appellant.

Carroll, for appellee.

R. LEE CRAWFORD v. W. J. CLARK.**Bills and Notes—Fraudulent Sale to Hinder and Delay Creditors.**

Two notes were given to Benton, by A. M. and Z. C. Merrill. Benton then placed both notes in the hands of Richardson for collection and then assigned the receipt of Richardson to Crawford. In the absence of proof of a valid sale for a valuable consideration, or a satisfactory explanation as to the different transfers, it is held that creditors of Benton could attack the attempted collection of the notes by Crawford, as having been transferred to defraud creditors.

APPEAL FROM ESTILL CIRCUIT COURT.

June 6, 1868.

OPINION OF THE COURT BY JUDGE ROBERTSON:

Opinion of the Court.

Benton, as first and principal defendant, being party to the issue and apparently interested therein was, as adjudged by the circuit court, incompetent as a witness for his volunteer co-defendant.

The execution of A. M. Merrell's note to Benton in discharge of Z. C. Merrell's note to him, and also of Z. C. Merrell's note to Townsend implied *prima facie*, that Benton then owned both of those notes. Townsend neither offered to become a party nor was apparently a necessary party to this suit, attaching the comprehensive note to Benton as his own exclusive property, and, without proof that the appellant, R. L. Crawford, held a beneficial interest in it, he had no right to intervene as a party. Even Benton's rejected deposition would not, if admitted as competent, prove that Z. C. Merrell's note to Townsend was executed through mistake to him alone, nor why it was so executed, if Crawford was equally interested as joint owner of the consideration of it, nor would it show satisfactorily why Benton was in possession of the note to Townsend, nor why, so soon after his delivery of that note as well as Z. C. Merrell's note to himself to Richardson for collection, he assigned to Crawford Richard's receipt to him for both notes. He does not state that he *sold* those notes to Crawford or received from him a valuable consideration for that assignment.

Nor does either Benton or Richardson attempt to explain why Benton thus assigned Townsend's interest, nor why, after the assignment, A. M. Merrell's note for the amount of both notes was executed, not to Crawford, but to Benton, if Crawford, and not Benton, was the beneficial owner of all. Nor is there any explanation of Benton's urgent attempt to collect the amount of A. M. Merrell's note about the time of the *lis mota* in this case.

Altogether it seems quite clear to us that Crawford has no just cause to complain of the decree subjecting A. M. Merrell's note to Benton to the payment of Benton's debt.

Wherefore, the judgment is affirmed.

Burnam, for appellant.

Cardwell, for appellee.

SAMUEL HULL *v.* AMOS BASSETT ET AL.**Pleading—Answer—Variance between Allegations and Written Contract.**

An answer, alleging that by an oral stipulation, (inconsistent with the written memorial of the contract sued on) the sale was to be void if the owners of a remainder should refuse to relinquish their interest, without proof of fraud or mistake in the written contract, is inadmissible.

Contract of Sale—Personal Property—Binding Consideration.

A purchaser of personal property in which there is a remainder life interest to others, known to him at the time, though the sale be attempted absolute with general warranty, is held to be estopped from denying liability on a note given for the purchase price, his purchase of the life estate being held to be a binding consideration.

Same—Action—Warranty.

His only remedy would be an independent action against the vendor on his general warranty.

APPEAL FROM MASON CIRCUIT COURT.

June 5, 1866.

OPINION OF THE COURT BY JUDGE ROBERTSON:

The bill of sale, though peculiarly ambiguous, purports a sale of the absolute title to *Minerva* as Basset's slave and a general warranty of such title.

It appears that, at the time of the sale, the vendee (now appellant) knew the *status* of the title to be a life estate in the vendor Basset, with remainder in his deceased wife's descendants, two of whom were infants, and some others married women. None of these were parties to the sale, which implies that, on the payment (a year after its date) of the consideration, they were to relinquish their title. The appellant must therefore be presumed to have known that all he got by his purchase was the appellee's life estate and his guaranty of the remainder, and this was a binding consideration commensurable with the amount of the note, and left no ground for a plea in bar of the action on the note, or for any other relief than an independent action on Basset's warranty, as the only remedy for a refusal by the owners of the remainder to con-

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firm the sale whenever a confirmation should be demanded by the appellant. And there is no proof of any such demand and refusal. There is therefore no proof of even a partial failure of consideration or of fraud. Nor although appellant enjoyed the use and retained the possession of Minerva for more than three years succeeding his purchase, is there any proof of an offer to return her, or to pay any portion of the price, or even hire.

The appellant alleges in an answer that by an oral stipulation, inconsistent with the written memorial of the contract, the sale was to be void if the owners of the remainder should refuse to relinquish to him their interest. But such a defense, either partial or total, without proof of fraud or mistake in the written contract is inadmissible. And even if it were admissible, it would be unavailing, as there is no pretense of proof of demand and refusal.

Wherefore, the judgment for the whole amount of the note for the price of Minerva is approved and affirmed.

F. M. BOHANNANK v. W. C. MILLS.**Pleading—Answer—Set-offs.**

An answer setting up a set-off for "services rendered, cash advanced, loaned, etc.," cannot be held good for an item in the account "for board of negro boy." The "etc." cannot be regarded as an allegation to anything.

Attorney and Client—Continuance of Cause—Withdrawal of Attorney from the Case.

Upon calling of a cause, for trial, if counsel withdraws and has his name stricken from it, it is the duty of the court to continue the action and award a rule against plaintiff to prosecute his suit. A delay for such rule can rarely produce injury when to give judgment immediately upon withdrawal of counsel, is fraught with great danger to the client.

APPEAL FROM JEFFERSON COURT. C. P.

September 19, 1868.

OPINION OF THE COURT BY JUDGE WILLIAMS:

The allegations of the answer setting up an off-set and asking

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judgment over are for "*services rendered, cash advanced, loaned, &c.*" In the account filed are the following items, which constituted the greater part of the claim for \$314 set up as the off-set:

Board of negro boy James from April 1, 1865, to	
September 25, 1865	\$178
Board for negro girl Mat	30

Making an aggregate sum of\$208

Whatever may be said of the imperfection of the reply, it was not more so than the answer and set-off, for the allegation of "services and cash advanced and loaned," could not authorize a recovery for board; the "&c.," as Lord Coke long since said, "means anything or nothing," and therefore cannot be regarded as an allegation as to any thing.

Strike these items for \$208 from the set-off, and there remains \$106—when the plaintiff acknowledges an indebtedness of \$120 to the defendant, showing a right of recovery in him of \$14. But as a jury on a previous trial found for plaintiff \$131.60-100, which the court set aside because it supposed the set-off not replied to, overlooking the imperfection of the answer, and as on the calling of the cause the plaintiffs counsel had their names stricken from it, the court should have continued the cause with a rule against the plaintiff to prosecute his suit; this would be but fair to him if his counsel for justifiable cause, unknown to him, should abandon the case, and but fair to the court to ascertain whether practitioners in his court for an unjustifiable cause or censurable practice has adopted such a course.

A delay for such rule can rarely produce injury, when to give judgment immediately upon counsel's withdrawal from a case is fraught with great danger to the client.

Wherefore, the judgment is reversed, with directions for a new trial and with leave to either party to amend and perfect their pleadings.

Marshall & Clarke, Harlan & Newman, for appellant.

Mix, for appellee.

Opinion of the Court.

LAVINIA ST. JOHN v. MART ST. JOHN.

Divorce.

A divorce, *a mensa et thoro*, where the proof shows that though for some years her husband had been habitually drunk and had treated her cruelly, yet, within the statutory period of five years before institution of her suit, his intemperance was only occasionally and unaccompanied by maltreatment, neglect or essential waste, and had attempted a reconciliation and restitution of conjugal rights, is held to be all that the evidence justifies.

APPEAL FROM LIVINGSTON CIRCUIT COURT.

September 14, 1868.

OPINION OF THE COURT BY JUDGE ROBERTSON :

It seems to this court that, by the decree for alimony and a divorce *a mensa*, the appellant has obtained at least as much as the record authorized her to claim or expect. Her claim to a divorce *a vinculo* is not satisfactorily sustained; for, though for some years preceding the statutory bar of five years before the institution of her suit, the appellee seemed to have been habitually drunk and to have treated her cruelly, yet within the said period of five years it seems that his intemperance was only occasional and unaccompanied by maltreatment, neglect or essential waste; and the charge of settled aversion is repelled by the fact that, after she left him contrary to an agreement to continue this co-habitation, he urged, more than once, a reconciliation and restitution of conjugal rights and relations.

Wherefore, the judgment of the circuit court is, on her appeal, affirmed.

Bush & Bush, for appellant.

W. E. CROWE & Co. v. H. C. BRUCE & Co.**Bills and Notes—Action on Demand Draft—Abatement—Premature Suit—Demurrer.**

In an action on a demand draft, where the answer avers that the time of payment by agreement between the drawer and drawee, had been extended some four months, it is error to sustain a demurrer to the answer.

Same.

Such a mistake, admitted or indisputably proved, would have entitled the defendants to an abatement of the answer, and as between drawer and drawee, an admissible defense.

APPEAL FROM DAVIESS CIRCUIT COURT. C. P .

October 13, 1868.

Bruce & Co. filed their petition in the Daviess circuit court, seeking recovery on a bill of acceptance, drawn September 23, 1867, and accepted same day by Crowe & Co. Defendants demurrer being over-ruled, they answered alleging in bar of their action that Bruce & Co. agreed with them at the time of the acceptance of the bill, that they should have four months' time in which to make payment, and left the acceptance with the Deposit Bank of Owsboro for convenience of defendants, but that disregarding said agreement, the acceptance was placed in an attorney's hands for suit, by said bank. Plaintiffs demurrer to said answer being sustained, and judgment rendered as prayed for, defendants appeal.

OPINION OF THE COURT BY JUDGE ROBERTSON:

If, as averred in the answer, the order was drawn for payment of goods bought on a credit of four months and that, through inadvertance or mistake, the credit was omitted in the order and in the unqualified complaint on sight, the action was brought prematurely and the appellee was not entitled to interest. Such a mistake, if admitted or indisputably proved, would have entitled the appellant to an abatement of the action, and was, as between drawer and drawee, an admissible defense.

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The circuit court therefore erred in sustaining the demurrer to the answer and thereupon rendering judgment for principal and interest.

Wherefore, the judgment is reversed, and the cause remanded for further proceedings.

Lindsey, for appellants.

Weir, for appellees.

JOSEPH A. BOONE v. M. P. CLARKSON.**Statute of Limitations—Promise to Settle Mutual Accounts—Instructions.**

In a suit on account, where the plea of limitations is filed with the answer, a refusal of the court to give an instruction for the defendant, that a promise to settle mutual subsisting accounts or an acknowledgment that he did not dispute plaintiffs account but that he had a larger account against him, was not such an acknowledgement as would take the accounts of the plaintiff out of the Statute of Limitations, is held to be erroneous

Same—Express Acknowledgment of the Debt.

In order to take a case out of the Statute of Limitations an express acknowledgment of the debt, as a debt due at that time (coupled with the original consideration), or an express promise to pay it, must be proved to have been made within the time prescribed by the statute.

Same.

This rule should never be extended beyond its letter, and therefore none but an express acknowledgment of the subsistence of the debt, from which it may be reasonably inferred that the party making it, intends to pay the debt, will be sufficient.

Exceptions to Instructions—When Must be Made.

Unless an objection be made to an instruction, when it is offered, it cannot avail an appeal, though an exception be taken to the ruling of the court when the instruction was given.

Evidence—Jury to Determine its Weight—Peremptory Instruction.

Evidence introduced by a defendant tending to prove an indebtedness of the plaintiff on the accounts relied on as set-offs should be submitted to the jury, that they may determine what parts, if any, or how

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much of the accounts had been proved, and not by a peremptory instruction limit the credits to the admissions in the reply.

Limitation of Actions—Set-off and Cross Petition.

A set-off being a substitute for a cross petition, and as to the time the statute began to run, must be treated as brought simultaneously with the original action.

APPEAL FROM GRAYSON CIRCUIT COURT.

October 10, 1868.

OPINION OF THE COURT BY JUDGE PETERS:

Appellee brought three actions against appellant, one for merchandise sold by himself, and two others as the surviving partner of two firms for goods and wares sold him.

To all three of which appellee pleaded the limitation of twelve months, the limitation of five years, and an account as a set-off; and in appellee's reply he relied on the statute of limitations as a bar to the set-off.

The three actions were consolidated and heard together, and resulted in a judgment against appellee in one, and judgments in favor of him in the two other actions, and of these two judgments against him appellant complains.

The first, and most serious difficulty in sustaining the judgments, grows out of the refusal of the court to instruct the jury as asked by appellant in instruction No. 6. In the following language: "That a promise to settle mutual subsisting accounts, is no such promise as above indicated, nor is an acknowledgement that he did not dispute Clarkson's account, but that he had a larger account against Clarkson, such an acknowledgement as would take the accounts or demands of plaintiff out of the statute of limitations."

In *Bell vs. Rowland's Admr.* Hardin 301, the rule was laid down which had been adhered to ever since in this state, and must govern in this case, which is "that in order to take a case out of the statute of limitations, an express acknowledgement of the debt, as a debt due at that time (coupled with the original consideration) or an express promise to pay it must be proved to have been made with the time prescribed by the statute."

This rule was recognized as the true doctrine on the subject in the later case of *Head's Exr., &c., vs. Manner's Admr.* 5 J. J.

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Mar. 255, in a well considered opinion after a review of the authorities on the subject, and the court said in the case *supra*. "This rule has however been *strictly* applied." It has never been extended, and never should be extended beyond its letter, and therefore, none but an express acknowledgment of the subsistence of the debt, from which it may be reasonably inferred that the party making it, intends to pay the debt will be sufficient.

In view of Heston's statements, which was the only evidence on the subject of an acknowledgment within the limited time, the instruction should have been given.

It does not appear that when appellee asked the instruction given at his instance, that appellant objected to it, and therefore, although an exception was taken to the ruling of the court when said instruction was given, still as the objection was not made in the first instance the error in that instruction could not be made available for reversal, but as the case must be reversed for the error already noticed in refusing to give instruction *No. 6*. It is proper to remark that as evidence was introduced by appellant on the trial tending to prove an indebtedness of appellee on the accounts relied on as set-offs, it would have been proper to submit that evidence to the jury, and let them determine what parts, or how much of the accounts had been proved, and not by a peremptory instruction limit the credits to the admissions in the reply.

Next. It is insisted that the plea of the statute of limitations in the reply of appellee is not good; because the statute ceased to run at the commencement of the original action, and not at the time of filing of the reply. In this case perhaps the fact as to when the limitation ceased to run would not be material. But in *Hayes vs. Goodwin*, 4 *Met.* 80, this court held that the set-off was substituted for a cross-action, and the cross-action is to be treated as brought simultaneously with the original action, consequently, the limitation ceased to run at that time.

For the error suggested, the judgment is *reversed*, and the cause is remanded, with directions to award a new trial, and for further proceedings consistent herewith, and appelle should be permitted to amend his reply if he should offer to do so.

Cofer, for appellant.

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EMILY PAGE v. THOMAS H. CRAWFORD ET AL.

Pleading—Answer, When not Required to be Denied under Oath—Written Instruments Filed.

Where in an answer a receipt is referred to as having been duly signed by the plaintiff, it must be filed with the pleadings in order to require the plaintiff to a denial of same under oath. The averment in the answer that it was executed, is not sufficient.

Mortgages—Fraudulent Transfer.

Facts as to dismissal of a suit to foreclose a mortgage, and a receipt given in full liquidation by acceptance of rent notes by mortgagor, held sufficient to declare fraudulent a subsequent assignment of said mortgage, and denial of genuineness of the receipt.

APPEAL FROM LOUISVILLE CHANCERY COURT.

October 13, 1868.

OPINION OF THE COURT BY JUDGE WILLIAMS:

The first prominent question to be decided is whether the averments of Bensinger's amended answer are sufficient to require of Mrs. Page a denial upon oath of the paper presented by him, purporting to be her and her husband's receipt for the rents of 1863, which averments are as follows:

"He says that he settled and accounted to S. K. Page and Emily Page for the rents so collected by him as will appear *by the receipt* endorsed on Rehan's lease that he fully accounted for the said rents and *that S. K. Page signed and receipted with his own and Emily Page's name.*"

There is no averment *that the husband was her authorized agent*, nor that *the receipt was her act and deed*; indeed, this seems to have been studiously avoided, for it even designates it as "*the receipt*" instead of "*their receipt*."

Section 588 Civil Code provides that

"where a writing purporting to have been executed by one of the parties, is referred to in, and filed with, a pleading, it may be read as genuine against such party, unless he denies its genuineness by affidavit before the trial."

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Instead of filing this receipt as a writing executed by Emily Page, the defendant stated facts which made it necessary for him to prove it was her act, and without this it should not have been read; therefore, she was not called on to controvert it by affidavit, and the chancellor erred in supposing all inquiry as to its genuineness was cut off by reason of there being no affidavit controverting it. And we think the evidence, facts and circumstances developed in this case negative its genuineness, at least do not establish it.

We are also satisfied from the evidence, facts and circumstances that the paper purporting to be signed by "B. Marks Co.," dated Louisville, March 14, 1863, filed by Mrs. Page in her suit, is genuine. This paper reciting that they had

"bought and got transferred to us three notes of Samuel K. and Emily Page, dated June, 1862, at 6, 12 and 18 months after date secured by mortgage all amounting to \$816; said Page and wife have paid and satisfied us for said notes to S. Maas by receipting to us the rent under our lease to Page for the year 1863, for the house occupied on Third street and receipting to us for the rent of the warehouse on Third occupied by Hanna (should be Hasig) & Ogles for 1863, and *transferring* to us Rehan's lease for the house he occupies on Third street for the year 1863," is fortified by the collecting the rents by N. Besinger, one of the firm of B. Marks & Co., by the non-accounting for the payment of the rent of the house then occupied by B. Marks & Co. and by the position of the names of S. K. Page and Emily Page on the back of said Rehan's lease, the color of the ink in which these names appear being of different kind and much older than the receipt written above these names, and the pregnant fact that it was not set up in the original answer, and which is the paper relied on by defendant Besinger, and fortified as these suspicions are by the parol evidence.

It is almost morally certain that these notes were liquidated as stated in the paper signed "*B. Marks Co.*"

Maas had brought suit to foreclose the mortgage on the first note; he proves that when B. Marks & Co. bought these notes he gave an order to his attorney to dismiss the suit, which was done; Marks & Co. would not have had this suit dismissed unless some satisfactory arrangement, by Page, had been made with them, and their said writing being on the back of the writ in Maas' suit is

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also significant that this arrangement between them and Page was owing to said suit.

Nor is the fact that the notes were then not taken up very significant, for the rents were not due, but had to run some time and be collected monthly.

S. K. Page was considerably advanced in life and may be presumed to be somewhat forgetful of recent transactions and events; besides, he died but a few months after said notes would be liquidated by the rents.

The transferring of said notes to Gay after S. K. Page's death, who in some manner was connected in business with the firm of Marks & Co., but how does not distinctly appear, the bringing suit and foreclosing said mortgage, and selling a portion of the land when Mrs. Page knew nothing of said transaction, nothing of said paper signed "B. Marks Co.," and which was not discovered until months afterwards, and then by accident, must be regarded as fraudulent.

The judgment, foreclosure and sale all being wrongfully and fraudulently obtained, and as the purchaser, Keller, who is acting for Mrs. Page, having no objections to the setting the sale aside, the whole should be declared null and void.

B. Marks & Co. and their assignee Gay should be perpetually enjoined from asserting said judgment or any rights under it, and Keller should release to Mrs. Page any right of title he may have acquired, and B. Marks & Co. and Gay should be compelled to restore to Keller any money he may have paid on said sale and purchase.

The chancellor's judgment dismissing Mrs. Page's suit was erroneous, and it is reversed, with directions for further proceedings as herein indicated.

Harrison & Bennett, for appellant.

Stirman, for appellees.

Opinion of the Court.

T. T. ALEXANDER v. W. H. SHEETS.

Receipt—Prima Facie Evidence.

Though a receipt is only *prima facie* evidence of payment, and may be explained, or even contradicted by evidence aliunde, in the absence of evidence of a mistake, or that it was not precisely what the writer of it intended it to be, it will not be disturbed.

APPEAL FROM M'LEAN CIRCUIT COURT.

October 9, 1868.

OPINION OF THE COURT BY JUDGE PETERS:

It is true that a receipt is only *prima facie* evidence of the payment of money, and may be explained, or even contradicted, by evidence *aliunde*.

In this case the receipt states explicitly, not only the amount received, and from whom, but goes farther, and states that the said amount is "paid by W. C. Mattingly on execution in favor of F. W. Alexander vs. Mattingly which issued from the McLean circuit court."

It is contended that the error or mistake in the receipt is that the money was not paid on the execution in favor of F. W. Alexander, but on one or more in favor of Garvin Bell & Co. v. Mattingly, and to sustain that position, Owen, the attorney who recovered the judgment in favor of Alexander, and of Garvin Bell & Co. v. Mattingly, and who received the money from Williams & Barrett, was introduced as a witness, who stated that he collected the money from Williams & Barrett, under instructions from Mattingly to do so, and to pay it on judgments of Garvin Bell & Co. and of Alexander against Mattingly which had not been replevied, and if that and other sums which Mattingly had paid him, overpaid the judgments which he had not replevied, the overplus was to be applied *pro rata* to those he had replevied, and that he "receipted to Williams & Barrett in the name of F. W. Alexander *indifferently* he being one of the plaintiffs in two of the executions." That it was not his design at the time, nor did he apply the money to the F. W. Alexander debt, but he forwarded it to Garvin Bell & Co.

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The witness does not state that he made any mistake in the execution of the receipt, or that it does not express what he intended it should express; nor does he explain what he means by saying he receipted in the name of Alexander *indifferently*. If he means by that mode of expression, that he was indifferent at the time of writing the receipt upon whose execution the amount should be credited, appellee should have the benefit of it, because the receipt in terms gives it to him, and this conclusion is strengthened by the fact that other sums paid by Mattingly had been applied to the payment of the unreplevied debts, and it is uncertain whether the attorney did not believe that the sums already paid by Mattingly, and others which might be realized from other claims of Mattingly in the hands of the attorney, and of Shackelford, the sheriff, sufficient to satisfy the whole of the judgment not replevied.

But there is no evidence of a mistake in the receipt, or that it is not precisely what the writer of it, who was the attorney of all the plaintiffs in said executions, intended it to be, and it is not sufficient to authorize a change of the destination of the money appropriated to the purpose designated in the receipts.

Wherefore, the judgment is affirmed.

Little, for appellant.

Sweeney & Tanner, for appellee.

L. R. GARVIN v. WILLIAM FREE ET AL.**Judicial Sale—Warranty of Title.**

The court having construed a deed, as being a mortgage and ordered a sale to liquidate the debt for which the deed was executed, the mortgagee cannot then be required to warrant the title to the purchaser at the foreclosure sale. He can only be required to reconvey such title as he received from the grantor.

APPEAL FROM METCALFE CIRCUIT COURT.

October 9, 1868.

OPINION OF THE COURT BY JUDGE HARDIN:

Opinion of the Court.

It seems to us the circuit court rightly construed the conveyance from Free to the appellant, made on the 26th of May, 1862, as a mortgage to secure the payment of the appellants entire debt for money advanced to reduce the land and his medical account, in all then settled at \$300.

The land was sold to Ferkin for \$675, of which \$150 was paid to Free and the residue of \$525 was paid to the appellant. From this sum the court seems to have deducted the \$300 and rendered judgment for the balance of \$225 less \$37.50. This judgment was, we think as favorable to the appellant as the facts would have authorized. And no error is perceived in the judgment for costs of the former suit.

But we do not concur in that part of the judgment which requires the appellant to convey and warrant the title to Ferkin. He was not bound to warrant the title to Ferkin or do more than reconvey such right as he received from Free, not to make himself responsible for Free's title. For this error the judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

James, for appellant.

Harlan, Compton, for appellee.

ANDERSON, McLANE & Co. v. WATERS' TRUSTEE, ET AL.

Trusts—Estate Created—Perpetuities—Word "Heirs" used, Synonymous With that of Children.

A grantor in creating a trust directed that the fund "be invested in business in the county of Jefferson, the profits to be applied to the payment of the necessary expenses first, and next to the maintenance of said Elizabeth and her heirs:" Held that the word "heirs" was used as synonymous to that of children.

Same.

Such a fund would not be subject to the debts of the husband, created not as trustee of the fund.

APPEAL FROM JEFFERSON CHANCERY COURT.

October 19, 1868.

Opinion of the Court.

OPINION OF THE COURT BY JUDGE WILLIAMS:

It is palpable that the grantor in the deed of trust used the word heirs as synonomous to that of children, as will be seen from the direction that the fund "be invested in business in the county of of Jefferson, the profits to be applied to the payment of the necessary expenses first and next to the *maintenance of said Elizabeth and her heirs.*"

Elizabeth Waters then had four children, it was the object of her father the grantor to secure this fund for their maintenance, not subject to the husband's debts, nor to his marital rights.

The fund itself should not therefore be subjected to his previous creditors not as trustee, but this should not be a cover to shield his own property therefrom. We concur with the commissioner and court that there would be no profits after supporting Elizabeth and her children.

Judgment affirmed on appeal and cross-appeal.

Bullock and Anderson, for appellant.

Dawson, Harney, for appellee.

J. B. BENEDICT ET AL v. W. E. SNODDY & Co.

Specific Performance—Deeds—Purchaser Entitled to Good Title before Payment.

Before an action for specific performance can be maintained, a vendor must show himself ready and able to make the purchaser of land a good title.

Married Woman's Contract—Coverture and Infancy.

A contract made with a married woman, who was also under age, upon complaint by her and husband, should be annulled, and restitution made on equitable principles.

APPEAL FROM BARREN CIRCUIT COURT.

October 2, 1868.

OPINION OF THE COURT BY JUDGE PETERS:

Opinion of the Court.

On the 7th of March, 1860, appellant, Catherine Benedict executed her note for \$250 due twelve months thereafter to D. P. Barclay for the one-half of the price of a small tract of land which she, on that day, contracted to purchase of said Barclay at the price of five hundred dollars, the one-half of which she paid down.

The note was assigned by Barclay to appellees, and in October, 1863, they brought this action against Mrs. Catherine Benedict and James B. Benedict, her husband, and others to coerce the payment of the note, claiming a lien on the land for its payment, and asking for its enforcement.

It appears from the petition that Mrs. Benedict at the time she executed the note was a married woman, and it is not alleged she was possessed, or was entitled to any separate estate; and in the joint answer of herself and husband, they rely upon both her coverture and infancy at the time she signed and delivered the note, and prayed by cross-pleadings to avoid the contract for a restoration of the money she had paid Barclay, and for general relief. On final hearing the court below decreed a specific execution of the contract; gave time for ten days in which Mrs. Benedict was to pay the amount of the note and cost of the action, and upon her failure to do so, ordered a sale of the land to satisfy appellee's debts and costs, and Benedict and wife have appealed.

It is not alleged in the petition that a conveyance of the land had been made either to Benedict or his wife by Barclay; but it appears that Barclay was dead leaving a widow when the action was brought; that his estate was insolvent and that his heirs are numerous, and many of them non-residents and married women and he died intestate; that he had not made a deed for the land, and it is alleged that appellees were able to make, or could procure to be made a title to the land, and at the same time of the trial it is certain they were not prepared to make a conveyance; they were not in a condition therefore to enforce a specific execution of the contract. And that may be rationally assumed as the cause of the sacrifice in the sale of the land when the commissioner sold it, for he reports the price at which it was bid off at \$165 less than one-third of the price for which Barclay contracted to sell it to Mrs. Benedict.

But there are two other fatal objections to the judgment; the pleadings of appellees show that Mrs. Benedict was laboring under

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the disability of coverture, when she entered into the contract, and her husband and herself could avoid it.

But in addition to this disability, she was then an infant and the contract should have been annulled on that ground upon the prayer of the husband and wife, as he did not join her, and there is no allegation that she was guilty of fraud, or any misrepresentation whatever. Wherefore, the judgment is *reversed* and the cause remanded with directions to rescind the contract upon equitable principles.

An account must be taken of the rents, and deterioration of soil, to be credited by any lasting improvements made by Benedict and wife and the interest on the \$250 paid in hand; the rents however not to exceed the interest on the whole purchase price, viz., \$500, and for whatever balance may be due Mrs. Benedict of the \$250 paid by her, she has a prior lien on the land, and whatever it may bring over and above the sum due her, appellees will be entitled to.

Rodman, for appellant.

Gorin, for appellee.

J. H. DEVAXHIER v. G. Y. BUFORD.**Boundaries—Patents—Meanders of River—Accidental Divergence.**

A patent in a survey that calls to run from a point of beginning, with the meanders of a river, necessarily imports that the river is the boundary. And though the courses and distances as designated may not always correspond with the sinuosities of the river, yet, as in all other cases of apparent and generally accidental divergence, the natural boundary controls and defines the land appropriated.

Adverse Possession—Conflicting Occupancy.

Without conflicting occupancy, the long possession by residence under an elder grant, claiming possession and use co-extensively with the entire boundary of a patent, is constructively actual and adverse possession to the same extent.

Same—Statute of Limitations—Right of Action.

The Statute of Limitations, limiting the right of entry to fifteen years, will not bar an action for recovery of land, in a suit between conflicting patents, and will not begin to run until after the junior patent has been actually obtained, since the plaintiff would have no right of entry or cause of action, until, so obtained.

APPEAL FROM BARREN CIRCUIT COURT.

October 19, 1868.

OPINION OF THE COURT BY JUDGE ROBERTSON:

The appellant claiming under a Kentucky patent issued to him in 1846, for 82 acres of land, brought this action of ejectment against the appellee holding under an elder grant issued in 1798. On the trial the jury found for the appellee, and the court overruled a motion for a new trial, rendered a judgment in bar of the action. The appellant had never been actually seized of any portion of the land in controversy, which lies on Barren river. The appellee and those under whom he holds had occupied the land for about fifty years. The true boundary of the elder grant is the principal question litigated in the case. That patent, conformably with the original survey, calls to run from the beginning with the meanders of the river, and that call is not limited to the first station, but is constructively continued to the last—for the call to lie on the river and to run with its meanders first to the mouth of Canoe creek and thence successively to all the other stations necessarily imports that the river is the boundary all around. And though the courses and distances as designated may not always correspond with the sinuosities of the river, yet, as in all other cases of such apparent and generally accidental divergence, the natural boundary controls and defines the land appropriated. The jury had a right to find that the river is the true patent boundary in this case, and that consequently the appellant's patent is void, because the special law under which it was obtained authorized the appropriation of vacant land *only*.

As there never was any conflicting occupancy, the long possession by residence under the elder grant, claiming possession and use co-extensively with the entire boundary of the patent, was constructively actual and adverse possession to the same extent. No doctrine is more firmly settled in Kentucky.

But, as the appellant had no right of entry or cause of action until he obtained his patent, the Statute of limitations did not sooner commence running against him; and, as the statute limiting his right of entry to fifteen years did not take effect until a few months after he brought his suit, his right of entry was not then barred.

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But we perceive no substantial error in giving or refusing instructions. Nor was the admission of the bond from Abraham Chapline to his son, for the purpose only of showing the boundary claimed and held to, an available error, for it corresponded with the other evidence which without it was altogether sufficient.

The jury could not have been misled by instructions or evidence. And their verdict is clearly sustained by proof of boundary and of the consequent invalidity of the appellant's title.

It seems to this court, therefore, that the verdict was right, and that the circuit court did not err in over-ruling the motion for a new trial and giving judgment on the verdict.

Wherefore, the judgment is affirmed.

Underwood, for appellant.

Rodman, for appellee.

J. A. McGEHEE ET AL. v. JOHN K. DITTO ET AL.

Personal Property—Descent and Distribution—Remainders—Rights of Distributees.

Extenuating circumstances, as to the forfeiture of the whole price received from the sale by a legatee, where there is a remainder interest, in the property, may arise so as not to deprive him of that part of the use of which would have inured to his benefit.

Same.

Money so received from such a sale, should be apportioned between the heirs according to their relative and respective rights, the value of the life estate therein ascertained by the established rule for computation, according to the American Life and Annuity tables.

APPEAL FROM MEADE CIRCUIT COURT.

October 14, 1868.

OPINION OF THE COURT BY JUDGE HARDIN :

The appellants, James A. McGehee, Joseph M. Phillips and Ann M. Phillips, his wife, and Adison C. McGehee, brought this suit in equity against John K. Ditto, Ferdinand M. McGehee and

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William C. McGehee, alleging in substance that said James A. and Adison C. McGehee and Ann M. Phillips, and said Ferdinand M. and William C. McGehee were the brothers and sisters of Elizabeth Ditto, deceased, late McGehee, and as such were her heirs at law. That said Ditto, as surviving husband of said Elizabeth, was in 1864 in possession of two slaves named Sally and Scott, which by reason of his marriage and the death of his wife belonged to him as tenant for life, and the estate in remainder was vested in her said brothers and sisters, she having no bodily heirs. They further alleged that in 1864 said Ditto sold the slaves Scott and Sally, and received for them about \$1,150. And by an amended petition they further alleged that said Ditto permitted the slaves to be removed out of this State without the consent of the owners in remainder, and that he put him in the Federal army as a substitute soldier, and that as such Scott was taken out of the State with said Ditto's consent. The plaintiffs therefore sought to recover against Ditto a judgment for the amount he received for the slaves.

The defendant Ditto by his answer admitted that he received \$900 for the services of Scott for one year from one Richardson, who used him as a substitute, and that he gave Scott \$50 of the money, and that he sold or hired said Sally to Armstrong, conditionally for a term of two years for \$200, but he denied the alleged absolute sale and conversion of the slaves, or that he permitted or caused Scott to be taken out of the State.

The court dismissed the plaintiffs' petition, and they have appealed to this court.

It sufficiently appears that the appellants James McGehee, Ann M. Phillips and Adison C. McGehee, and said Ferdinand M. McGehee, were the half brothers and sisters of said Elizabeth Ditto, and that said William C. McGehee was her brother of the whole blood, and that they and her mother, Eliza McGehee, were as heirs of said Elizabeth, the owners of the slaves in remainder according to the relationship they respectively bore to her.

It seems to us, also, that the disposition made of the slave Scott was equivalent to an absolute sale for \$850, and was a substantial conversion of the estate in him in remainder, but at a time when the property in him as a slave had, in consequence of the civil war, become prospectively of little or no value; and for that and other reasons appearing in the record, we do not regard the transaction

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as such a violation of the provisions of the 9th section of article 1 of chapter 93 of the Revised Statutes, as should operate to forfeit to the owners of the slaves in remainder the whole amount received for him; but under all the circumstances the money so realized should be equitably apportioned between them and the defendant Ditto, according to their relative and respective rights; the value of said defendant's life estate in said \$850 realized by him, being ascertained by the established rule for computing the value of a life estate and annuity, according to the American life and annuity tables.

As to the money received for the slave Sally, it does not appear to us that the plaintiffs manifested any right of recovery, as the transaction with Armstrong is not shown to have been more than a hiring of the slave for two years which expired during the continuance of the life estate.

But for the errors we have indicated in regard to the proceeds of the slave Scott, the judgment is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Alexander & Kincheloe, for appellants.

Walker, for appellees.

GEORGE H. PERRIN ET AL V. PHILIP AMMERMAN.**Bills and Notes—Usury, Waiver of Claim for—Administrators.**

An obligor and sureties in a note, have the right to claim usurious payment of interest on a note, given a deceased, while that note is in the hands of the administrator.

Same.

But where it has passed into the hands of one of the distributees as his share of the estate. and the distributee is induced to accept a renewal, and to receipt the administrator in full settlement, the estate being closed, they cannot then set up a claim for usury except for that part as would have fallen on the distributee as his share of such loss based on a prorata distribution.

Same.

A right they had. while the note was in the hands of the administrator, was waived by inducing the distributee to take the new note, except so far as his individual interest therein was concerned.

Opinion of the Court.

APPEAL FROM HARRISON CIRCUIT COURT.

October 14, 1868.

OPINION OF THE COURT BY JUDGE PETERS:

This action was brought in April, 1867, by appellee against appellants on a note executed to him by H. Rowland with appellants as sureties on the 23d of May, 1863, and due the 23d of March next thereafter for \$1,788.50.

As a defense to the action, appellants in the first paragraph of their answer allege, in substance, that their principal, for many years prior to the death of one James Ammerman, was indebted to him for borrowed money, the notes for which were frequently renewed, always at an interest of ten per centum per annum, compounded annually, all of which said H. Rowland had paid off to said James Ammerman in his life time, except about \$500, for which he executed his note, unurious interest constituting the whole thereof; that said James Ammerman died intestate, and his estate descended to his brothers and sisters, of whom appellee was one, and that said note was passed to him as a part of his distributable share of said decedent's estate; that H. Rowland then borrowed of appellee a sum of money at an interest of 8 per centum per annum, which sum with its interest added to the note aforesaid of about \$500, made up the amount for which the note sued on was executed.

The second paragraph of the answer need not be specially noticed, as the facts stated therein were insufficient to constitute a novation, which was the purpose for which it was filed, but which seems to have been abandoned.

In the 3rd paragraph it is alleged that said H. Rowland on the 23d of January, 1864, borrowed of appellee \$1,000, and promised to pay interest thereon at the rate of ten per centum per annum, to be compounded annually, and delivered to him a note, which said Rowland held on F. G. Veach for \$2,000, bearing interest at the rate of 6 per centum per annum, from the 10th of December, 1863, the day of its date, till the 1st of January, 1870, when the note would become due, as collateral security; appellee was to collect the interest which was payable annually, and apply the same to the payment of the interest on the note for \$1,000.

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On the 11th of March, 1867, said H. Rowland paid off said note for \$1,000 with the interest, according to their agreement, by assigning to appellee the Veach note, and the residue of said note he was to apply as a credit on the note sued on, that note to carry interest at the rate of ten per centum per annum till the Veach note matured, and that said credit amounted to about \$1,000.

It is alleged in the 4th paragraph that, on the \$1,000 note, Roland had paid for usurious interest, from the time the money was borrowed until the 11th of March, 1867, when the same was paid, \$148, which he had assigned to appellants, and they plead the same as a set-off in this action. They insist that by crediting the note sued on by the true amount that appellee would be owing on the Veach note, and purging it of the usury, there would be very little due on said note, if anything; that the credit for the residue of the Veach note should be for \$1,085.38-100 instead of \$586.69-100 for which the credit was entered.

The set-off is controverted by the reply, not by a denial that there was as much as \$148 of usury paid on the \$1,000, but by a denial that it was assignable, and that appellants acquired a right thereby to have a credit for the same in this action.

By agreement of the parties, a credit was entered for \$838.90-100 as of date March 11, 1867, in place of \$586.60 credited on that date on the note, the issues of fact presented by the pleadings were then submitted to a jury, who returned a verdict for the amount of the note and interest, to be credited by the \$838.60 as agreed, and the \$148, making the aggregate of \$986.90 of date March 11, 1867, and \$50 of date the 23d of May, 1863, and judgment was rendered accordingly.

A new trial was asked for by appellants, and over-ruled, and they now ask a reversal of the judgment.

The instruction given for appellee is not copied in the record, nor does it appear to have been excepted to, so that the propriety of giving said instruction cannot be inquired into by this court.

Instruction No. 1, as asked by appellant, was properly refused; because the evidence did not authorize the giving of it. And those given by the court were as favorable, and, indeed, one of them were more favorable, than they had a right to them.

The only remaining question to be determined is whether the court erred in refusing a new trial on the ground that the verdict was contrary to the evidence.

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The witnesses Tebbs and Renaker prove that the statements of H. Rowland, as to the amounts loaned by J. Ammerman on the former trial were different from those made by him when the verdict was rendered; but his statements made on the subject of the rate of interest agreed to be paid on the note which he owed at the death of James Ammerman, and on the money borrowed when that note was renewed, constituting the note sued on, was at the rate of eight and of ten per cent, and which was in part included in the note, and the residue paid at 10 per cent in the transfer of the Veach note, stand uncontradicted; nor is there any conflict in his evidence in relation to the rate of interest paid on that indebtedness; the witness is competent and unimpeached, and the truth of his statements is, to some extent, shown by arithmetical demonstration. Nevertheless they were disregarded by the jury, and their finding was in conflict with the instructions of the court, and should for these reasons have been set aside, and a new trial awarded.

As the judgment must be reversed, it is proper to settle the law as to the effect of the settlement by appellee of the note held on H. Rowland, &c., by James Ammerman at the time of his death. Appellee was not the sole heir and distributee of James Ammerman; if the note held by him had been purged of the usury (if any), while in the hands of the administrator, the loss would not all have fallen on him, but would have been borne by all the distributees *pro rata*, and any equity that would have been available against the administrator would be only available against appellee to the extent of his interest in said note as distributee, after he took the note as so much of his part of the estate of intestate. But he was induced by Rowland to take up the note, and to accept another note on himself and appellants in satisfaction thereof, and to receipt to the administrator for the same as a payment on his distributable share of intestate's estate, and he could not afterwards have recovered of the administrator for any loss he might have sustained by the transaction. The right which they had to reclaim the usury while the note remained in the hands of the administrator, and thereby throw the burden on all the distributees in just proportion was waived by inducing him to take the note, except so far as his individual interest therein was concerned. Instruction No. 1, therefore, given by the court to the jury, in place of the one asked by appellants, was more favorable to them than they were entitled to.

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This view conforms to the principle settled in *Smith v. Broyles*, 15 B. Mon., 461.

But for the reasons heretofore stated, the judgment must be reversed, and the cause remanded, with directions to award a new trial, and for further proceedings consistent herewith.

Trimble, for appellant.

Ward, for appellee.

ISAAC WALKER ET AL v. ANTHONY MCFADDEN.**Estate—Settlement of—Suit of Co-heirs for Distribution.**

One of co-heirs, who makes voluntary trips to try to purchase the interest of the others, cannot claim such expenses paid as a debt against the estate, in a subsequent action by the other heirs against him.

A fortiori, counsel fees will not be allowed him.

Same—Advancement.

Such amounts as were paid to the heirs, will be a charge against their individual interest and not a charge against the whole estate.

APPEAL FROM BOURBON CIRCUIT COURT.

May 25, 1868.

OPINION OF THE COURT BY JUDGE WILLIAMS:

George W. McCurty, having died intestate and in minority in Bourbon county, Kentucky, his estate descended to his paternal and maternal collateral kindred, appellee, and the descendants of his brothers and sisters, being those of the paternal branch; the estate consisted of \$9,800 money due for land which had descended to him from his father and which had been sold by order of court, and some several acres adjoining Paris, which had not been sold.

Appellee went to Philadelphia, where most of his nephews and nieces and his father lived, and procured from quite a number of these a power of attorney and also a transfer of their interest to

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himself, and made some of them small payments, representing, as they aver, the estate to be about \$600.

These heirs soon revoked their power of attorney and notified the commisisoner not to pay over any money to him. All the parties appeared in the suit and by pleadings and cross-pleading the issues were made.

He abandoned his claim as purchaser, at least never asserted it, but put in charges for his expenses in making three trips to Philadelphia, attending to the suit for them, and for three-fourths of the attorneys fee of \$300, and the court adjudged him as against them \$80—expense in going to Philadelphia, \$225 or three-fourths of the attorneys fee, and \$325 the money advanced, and of this they complain.

It is evident that his first trip to Philadelphia was voluntarily undertaken by him for his own private benefit, in speculating upon his co-heirs by purchasing their interest, at least he made to them no such fair disclosure of the real amount of the estate as to raise the presumption that he was acting for their benefit, and before his other trips they were antagonistic litigants, they having employed their own attorneys; therefore, he has no claim upon them for expenses for any character in conducting the suit. Had he in good faith prosecuted a joint suit in all their names the chancellor would very properly have allowed all the necessary expenses and the attorneys fee as legitimate costs of the suit, but this was not the case, for even those whose names he made known to the court by his pleading he made defendants instead of co-plaintiffs. And for the same reasons they are justly chargeable with no part of his counsel fees.

He is entitled, as against those to whom he made advances, for a judgment for the several sums paid them, but this must be a separate judgment against each for the amount advanced to him, and not a sum in gross as against all, including those to whom he made no advances. Those that got no advances are in no wise liable to him for the amount paid to others; each alone is liable for the specific sum received by him or her.

And if some have received partial advances, the amount should be adjudged as against him out of his part of the fund, yet undistributed, and if there are not sufficient, an order of return of what they have received or a sufficiency to cancel the amount so properly due from them should be made, or the subjecting their share of the remaining unsold land thereto.

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For these errors, the judgment is reversed, with directions for further proceedings consistent herewith.

Prall, for appellants.

Hunt & Beck, for appellee.

JAMES W. POWELL v. CHARLES F. BARLEY.

New Trial—Violation or Right Instruction by Jury.

Though there be no substantial error in giving or refusing instructions, a verdict inconsistent with a proper instruction given, will authorize the granting of a new trial.

Evidence—Interested Party to Suit, as a Witness.

One whose interest appears as against a defendant, and for the plaintiff, in a suit for breach of warranty, is incompetent as witness.

Instructions.

Where a private sale, under an execution levy is made, and no proof, in a subsequent action, that this sale, produced as much as a public sale, it is error for the court to refuse an instruction, "that such a sale was a breach of the sheriffs bond and made him liable to this action for whatever damage resulted to Powell from failing to make a public and official sale of the horses."

Idemnifying Bond—Execution Sale—Sheriff.

In the absence of proof or notice that property levied on under an execution belongs to other than the execution debtor, the sheriff has no right to require an idemnifying bond.

Same—Notice of Sale Without Bond.

If the sheriff has, in good faith, reasonable doubt as to the liability of property to the execution, he has no right to release the levy, without reasonable notice to the execution debtor that he would not sell without a sufficient bond.

Same—Sufficient Notice to Execution Debtor.

Notice to an execution debtor, of a discharge of a levy, without a bond of indemnity be forthcoming, given at twelve o'clock on the day of sale, held insufficient.

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Same—Evidence—Interested Witness.

The levying deputy, being liable to his principal for a release of the levy, he was incompetent as a witness to prove a reasonable notice on his demand of the execution debtor, for a bond of indemnity.

APPEAL FROM WASHINGTON CIRCUIT COURT.

May 26, 1868.

OPINION OF THE COURT BY JUDGE ROBERTSON:

The alleged discovery of the evidence of Donatus Mudd was not a sufficient cause for setting aside the verdict in favor of Powell on the first trial, because it appeared that his title to the black horse was asserted to Casey and the deputy sheriff, Moffit, when the levy of Pope's execution was made, and consequently there was no pretense for saying that the discovery was made after the trial, or that a vigilant party ought not to have made it before the trial.

But, as evidence on that trial showed that before a levy of Pope's execution, Powell agreed that the black horse and several horses found by Casey, might be levied on and for Pope's benefit, the verdict for the whole amount of Powell's execution was inconsistent with a proper instruction given by the circuit court.

And therefore, though there was no substantial error in giving or refusing instructions on that trial, the simple fact that the verdict violated a right instruction, sustained the grant of a new trial.

But it seems to this court that the judgment in the sheriff's favor on the last trial is also erroneous for the following reasons:

1. It sufficiently appears that Pope had not lost his recourse against his assignor, Casey, and that Casey's only chance of exoneration after the return of "no property" on Pope's execution was the sale of those two horses for Pope's benefit and the sale of which he therefore, in self-defense, effectuated by his own intervention and at his own risk. Casey's interest against Powell in the result of this action is consequently obvious and proximate.

The circuit court therefore erred in over-ruling Powell's objection to his competency and in permitting him to testify, in virtually his own case against Powell.

2. If Powell waived his priority, his alleged agreement implied

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consent to a private sale as made. And consequently there being no proof that the sale, as made, brought as much as a public sale under Pope's execution would have produced, the circuit court erred in refusing to give Powell's 2nd instruction to the effect that as to him, the private sale was a breach of the sheriff's bond and made him liable to this action for whatever damage resulted to Powell from failing to make a public and official sale of the horses.

3. The uncontradicted testimony of the execution debtor, proves that the roan mare, on which the deputy Rosley levied Powell's execution, was subject to levy and sale as his property. And there is no proof that she was claimed by any other person. Without some such evidence, express or implied, the levying deputy had no right to require an indemnifying bond. But if he had, in good faith, reasonable doubt of the liability of the mare to the execution, he had no right to release the levy, as he did, without reasonable notice to Powell that he would not sell without such bond. Notice, on the day appointed for the sale, to Powell's agent about 12 o'clock on the day, was not reasonable notice to Powell, who was neither actually nor potentially present to execute the bond. And the testimony of the deputy himself is the only evidence of any previous or more reasonable notice. As the deputy would be liable to the principal for an alleged release of the levy, he was incompetent as a witness to prove a reasonable notice of his requisition of a bond of indemnity. And therefore the circuit court erred in over-ruling Powell's objection to the competency of that witness on that point.

Wherefore, the judgment appealed from is reversed, and the cause remanded for a new trial.

Judge Hardin did not sit in this case.

Harrison, for appellant.

Kavanaugh, for appellee.

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WALTER CRAIG ET AL V. RICHARD HAWES ET AL.

Lands—Execution—Sale—Fraud and Collusion—Trusts.

Evidence of an inadequacy of price, and the interest of a purchaser, as an heir, and acting trustee for several other heirs, held sufficient to vacate the sale of a large tract of land, appraised at \$3,200, and sold for an execution of \$144.

Sams—Bona Fide Purchasers.

The purchasers of a portion of said land, from the execution purchaser, for a valuable consideration, without notice of the equity of co-heirs, cannot be divested of their holdings, in a subsequent suit by such heirs.

Same—Right of Co-heirs to Restitution.

Though the heirs are estopped from such recovery, they can by proper proceeding force restitution of the amount obtained by the sale of the lands to such bona fide purchasers.

APPEAL FROM GALLATIN CIRCUIT COURT.

May 27, 1868.

OPINION OF THE COURT BY JUDGE HARDIN:

A suit in chancery was for many years pending in the Gallatin circuit court in the names of Richard Hawes and his wife and other heirs and claimants of the estate of George Nicholas, deceased, against Louis Sanders and others, in which partition was sought of a portion of a tract of about 17,000 acres of land owned by George Nicholas at his death and known as the Merriwether South Survey; but which with other estate of said decedent, having been subjected to sale and purchased by Wilson C. Nicholas, had been subsequently conveyed by him and Samuel Smith to James Morrison, executor of George Nicholas, upon certain trusts for the benefit of the heirs of the latter, and was afterwards vested in said Richard Hawes and S. S. Nicholas upon trusts for the benefit of said heirs of George Nicholas by the deed of Henry Clay, executor of Morrison, made in 1834 in pursuance of the award of arbitrators to settle a controversy between said heirs and Morrison's Exor. in the Jefferson circuit court.

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During the pendency of said suit and prior to the year 1837, Louis Sanders who had intermarried with Ann Nicholas, a daughter and heir of George Nicholas, deceased, appears to have resided on the land. Besides the interest of Mrs. Sanders as one of said heirs, in the land she appears to have acquired certain other interests from her brother, S. S. Nicholas, and others. Louis Sanders being thus upon the land and interested in the right of his wife, seems to have acted also as the agent of his wife's co-heirs, either with or without authority from them in prosecuting suits against alleged trespassers and squatters on the land. And among other actions so instituted suits against H. B. Partlaw and others, and William Wood and others, which resulted in judgments for costs against the heirs of Nicholas on which executions were issued as follows:

1. *Fifa* in favor of William Wood against the estate of George N. Sanders and other heirs and legal representatives of George Nicholas, deceased for \$9.91
2. *Fifa* in favor of H. B. Partlaw and others against the estate of Roberts C. Nicholas and others who are named as the "surviving children and heirs of George Nicholas, deceased for \$111.82
3. *Fifa* from court of appeals in favor of the same against the same for \$13.74 and 45½ cents \$14 19½

These actions appear to have been levied by the sheriff on the 13th day of May, 1839, on a tract of land, imperfectly described, in the original levy as "joining Walton Craig and William O'Neal, belonging to the heirs of Nicholas, near Ghent." The sheriff annexing to his return the following statement: "Given up by Louis Sanders, agent, Levi Abbett, S. C. C." This tract appears to have contained near 800 acres and to have been part of the 17,000 acre survey, and was sold by the sheriff and purchased by John C. Lindsey for \$144.21, the estimated amount of the three executions, the land having been first appraised by Walter Craig and Benjamin Craig at \$4.00 per acre, and the sheriff afterwards, by his deed dated July 6th, 1839, and more specifically describing the land sold, conveyed it to Lindsay, from whom it is alleged by the appellants, that George N. Sanders, a son of said Louis and Ann Sanders and thus an heir of the latter, who had died, subsequently purchased it.

The land or most of it having passed into the possession, of

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sub-purchasers of George N. Sanders,—among them, the parties Walter Craig and William O'Neal, to whom said G. N. Sanders, and L. Sanders, Jr., executed a deed, dated July 8th, 1839, for about 293 acres at the price of \$2,934.87½—Richard Hawes and wife and others of the original complainants in said suit for partition, which was still pending, in October, 1846, filed an amended bill therein, seeking to vacate the sale and conveyance to Lindsay and eject the tenants in possession for alleged fraud and collusion on the part of Louis Sanders, Sr., George N. Sanders and Lindsay, together with the inadequacy of the price paid by Lindsay and irregularity and illegality of the levy and sale.

The litigation thus initiated, between the parties to said amended bill, was finally decided by the circuit court in March, 1865, when it was adjudged that “the deed to Lindsay be vacated and held for naught and that the parties, defendants in possession surrender up to the plaintiffs the tract of land in controversy upon the payment by the said plaintiffs of the purchase price paid by John C. Lindsay, viz: One hundred and forty-four dollars and twenty-one cents (\$144.21), without interest, and that the plaintiffs recover of defendants their costs.” From this judgment and the further order awarding the plaintiffs a writ of possession, Lindsay, Craig and others have prosecuted this appeal; and Hawes and wife and others seek a reversal on their cross-appeal for the refusal of the circuit court to hold the defendants liable for rents of the land.

As conceded in the argument, the pendency of the original suit for partition, cannot affect the validity of the sale except in so far as it may show the relations which Louis Sanders and George N. Sanders occupied towards the appellees at the time the appellants purchased the land; the pleadings not being such as to place the appellants in the attitude of *pendente lite* purchasers.

After a careful examination and we think, mature consideration of the various points on which, it is insisted by the counsel for the appellants, that the sale made by the sheriff was void for irregularity, as decided by the circuit court, we do not concur in that conclusion of the court. But without elaborating this opinion by a discussion in detail of the many questions raised as to the regularity of the sale, none of which have been overtasked, our conclusion is that the sale was not void as adjudged by the court below.

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Whether it should not have been set aside partially or *in toto* for the inadequacy of the price at which Lindsay purchased and fraud in the procurement, presents a graver, and to us a more perplexing question.

Although the charge of a fraudulent collusion between George N. Sanders, the sheriff, and Lindsay is denied by Lindsay, and we see no sufficient cause to infer that the sheriff acted in bad faith, there are facts connected with the claim of George N. Sanders under the purchase, as derived through Lindsay, which in connection with the erroneous succession at which the sheriff's sale was made, are sufficient, in our opinion, to vacate the sale in a court of equity, at least so far as the rights of Sanders are concerned. Although Lindsay professes to have sold the land after his purchase to Sanders for a fair price, the price he received, if anything more than that at which he made the purchase, is not disclosed. And although George N. Sanders and Louis Sanders, Jr., by their deed made July 8th, 1839, but two days after the conveyance of the sheriff to Lindsay, sold 293 acres of the land to Craig and O'Neal for \$2,934.87½, it does not appear that G. N. Sanders acquired the title or held any written evidence of a purchase from Lindsay, till Lindsay executed a deed to him dated the 19th day of December, 1840, and for the expressed consideration of one dollar; and how Louis Sanders, Jr., acquired a joint interest in the land with George N. Sanders does not appear. These facts and circumstances, considered in connection with the further facts that the 800 acres of land which Lindsay purchased at \$144.21 was worth four dollars an acre, and that both George N. and Louis Sanders, Jr., were at the time of the sale interested as part owners of the land with the other heirs and devisees of George Nicholas, deceased, constrain us to approve and affirm the judgment of the court below except in so far it divests the rights of parties, who may stand in the position of *bona fide* purchasers for a valuable consideration, without notice of the equity of the appellees as against Lindsay and George N. Sanders. But the appellant Craig and the representatives and heirs of O'Neal seem to us to occupy that position. The price paid by them and for which they accepted the deed of G. N. and Louis Sanders, Jr., appears to have been full and adequate, and it is neither alleged nor proved that they had notice of the equity of the appellees; and we are of the opinion that said Craig and those

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who hold under the said title of O'Neal are entitled to be protected in their title under the deed from G. N. and Louis Sanders, Jr., but the other sub-purchasers or tenants under them have not shown themselves entitled to like protection.

And while we adjudge that the appellants cannot for the reasons stated, recover the land sold to Craig and O'Neal, they are not in our opinion without remedy as against the Sanders to recover for money for which they sold the land.

Wherefore, the judgment, so far as it affects the rights of said Craig and O'Neal's heirs and representatives or parties claiming under O'Neal is reversed with directions to dismiss the action as to them, but the residue of the judgment is affirmed on both the original and cross appeals.

Winslow, for appellants.

James, for appellees.

L. BARNEY v. W. C. HALBERT.**Judgment Against a Non-Resident—Pleadings—Essentials of Petition.**

As a petition, against a non-resident, averring a readiness to convey lands sold to defendant, stands traversed, it is essential to recovery, that the plaintiff show he possesses an unencumbered legal title, and a tender of such a deed made in court.

Same.

It is error to adjudge a sale of a defendant, non-residents' property, where the allegations of the petition neither allege nor seeks to point out the interest the defendant holds in the property, nor such title shown in the judgment.

Sale of Personal Property—Stock in a Petroleum Company.

The measure of damages for failure to pay for subscription to stock is not its par, but its cash value on the day to be paid.

APPEAL FROM LEWIS CIRCUIT COURT.

May 30, 1868.

OPINION OF THE COURT BY JUDGE WILLIAMS:

Opinion of the Court.

Appellee, asserting a vendor's lien for \$5,000 purchase price in money, and 600 shares in a petroleum company, at \$25 per share, par value, amounting to \$15,000, all which he averred was unpaid, attached various lands and joint interest of the appellant in lands, beside asserting his vendor's lien upon the 500 acres of land sold, but which was not conveyed. It appears that the purchase price was to be paid at a future, specified time and a conveyance by general warranty clear of all encumbrances was to be made upon the same day upon the payment of the purchase price. Plaintiff averred his ability and readiness to convey and avers a tender of the deed in and with his petition, but no such deed appears in the record.

The sheriff returned the attachment levied upon some of the lands and his joint interest in others, and that the defendant was a non-resident.

The court thereupon gave a personal judgment for plaintiff's claims and sustained the attachment upon parol proof heard in court.

Subsequently, after the adjournment of the court, the plaintiff by a paper filed, released the personal judgment and order of sale, but reserved the benefit of the adjudication as settling the rights otherwise between the parties.

At a subsequent term, after a deposition proving the defendant's non-residency, had been taken, the court again sustained the attachment and ordered a sale of a sufficiency of the attached property to pay the debt and reserved a lien upon the land, and defendant has appealed to this court for a correction of errors.

That the material allegations of plaintiff's petition stand denied upon proceedings against a non-resident, is too clear for controversy, therefore, as plaintiff's averment that he was able and willing to convey stood traversed, it was essential to his recovery that he should show he possessed an unencumbered legal title to the land sold, so far from having done so he does not even suggest by what title he holds the land, or how he became possessed with the legal title. To adjudge a sale of defendant's property until this was made manifest was a radical error.

There is no evidence in the record of the legal title of defendant to the lands attached, it is true it is averred how he became possessed of the title to the various tracts, but the deeds are not in, and whether these titles were unencumbered by vendor's liens

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are neither averred nor shown. It was erroneous to expose to sale a non-resident's property without ascertaining these facts, as both detrimental to him and uncertain to the bidders; the chancellor should always assure to purchasers the kind of title he offers for sale.

But as to his undivided interest in the 250 acres and 8 acres which seems to be the joint property of a petroleum company, in which it is averred defendant is a joint holder, his interest, however, is neither averred nor ascertained, and what the purchaser would get cannot be determined by this proceeding, this was radically wrong.

Whether attachments should be deemed to be embraced by the spirit of an act of February 12, 1838, 2 Stant., Rev. Stat. 513-15, regulating the sale of partnership and joint property taken under execution, there is no doubt but the chancellor should ascertain both the interest and title of the defendant before exposing his property to sale, and if need be clear away the encumbrances so as not to sell to purchasers a litigation.

It is not clearly discoverable whether the court intended to adjudicate \$15,000 for the unpaid 600 shares of petroleum stock, but if so, this would also be a fatal error, as the true measure of damages would be its cash value on the day to be paid.

For these errors the judgment is reversed, with directions for further proceedings consistent herewith.

Stevenson, Myers, for appellant.

Taylor, Ireland, Halbert, for appellee.

B. B. GROOM *v.* T. B. OLDHAM.**Conditional Sale—Instructions—Personal Property.**

Upon a contract to furnish horses to the Government, the evidence showed that two of the horses had been delivered to the Government Agent, but never inspected, and not paid for. In a question of which of two vendors should stand the loss, the jury should have been informed by proper instructions whether it was an absolute or conditional sale, whether the horse had been delivered as directed by one vendor, whose duty it was to have them inspected, and whether delivered, branded or unbranded.

APPEAL FROM MONTGOMERY CIRCUIT COURT.

September 16, 1868.

OPINION OF THE COURT JUDGE WILLIAMS:

The evidence is conflicting as to the character of the sale of the mare by appellee to appellant, whether absolute or conditional upon her passing inspection by the United States inspector of horses wanted for the military service of the Government; also as to whether the mare was delivered at the residence of Lowry where Groom was collecting his horses, and whether he ever got possession of her.

Lowry says the next day after the inspection and after Groom had left, he delivered the number of horses inspected to the Government agent and there still remained two not inspected or branded, one of which was a dark bay or brown, some 8 or 10 years old, and that he subsequently delivered thereon the order of the Government agent Peckover.

In this state of the evidence the questions, not only of whether it was an absolute or conditional sale, whether the mare had been delivered in the lot or directed by Groom, but, also, whether she had not been inspected and if not by whose neglect, oversight or mistake should have been determined. It is palpable from this evidence that the mare was delivered at Lowry's and not inspected and that Groom never got the benefit of her, but that the government agent got her without paying any one for her. If this should be the case then it presents the legal question as to which

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of two innocent parties must bear the loss and this can be decided alone by the determination of whose duty it was to procure the inspection, if appellants, then the neglect to have her inspected fixes the loss upon him; if appellees, then the loss must be his.

We think this a case where a special as well as general verdict would be highly appropriate, for upon the finding of a few facts the law would determine the rights of the parties and we direct that at least the following special direction be submitted to the jury:

1. Whether or not the sale was absolute or conditional.
2. Whether or not the mare was delivered at Lowry's as directed by Groom and put in the lot.
3. Whether or not the mare was inspected by the Government inspector.
4. Whose duty was it to have the mare inspected.
5. Was or not the mare delivered to the Government agent either branded or unbranded, and which.

The instructions did not comport with this view of the case and was therefore misleading and may have produced an erroneous verdict, but, however this may be, the law can well pronounce its judgment upon the special finding of the above facts whatever may be the general verdict.

Wherefore, the judgment is reversed, with directions for a new trial and further proceedings as herein directed.

Reid & Reid, for appellant.

Holt, for appellee.

GEORGE HUSTON AND J. S. TAYLOR v. J. B. DRURY.

Attorney and Client—Excessive Fee in Divorce Proceedings.

Though the evidence may show the services of attorneys for the wife, in divorce proceedings, to be worth \$300, in the absence of evidence as to the ability of the husband to make such a payment in that the estate is not ample, the court will not reverse the court below for an allowance of only \$150.

APPEAL FROM UNION CIRCUIT COURT.

Opinion of the Court.

September 17, 1868.

OPINION OF THE COURT BY JUDGE PETERS:

Upon a joint proceeding of appellants, not being partners, by motion against appelle to recover three hundred dollars for services rendered his wife as her attorneys in defending a suit brought by him against her for divorce; the court below adjudged he should pay them one hundred and fifty dollars, half the amount claimed by them, and to correct that judgment this appeal is prosecuted.

Whilst appellants have shown by the evidence what the services rendered Mrs. Drury in defending the suit were reasonably worth three hundred dollars, or one hundred and fifty dollars each, still an allowance of three hundred dollars to them against appellee could not be made without a departure from the principle settled by this court in the case of *Burgess vs. Burgess, 1st Duvall 287*, for which we see no sufficient reason, especially as the evidence does not show that appellee's estate is ample.

Wherefore the judgment is *affirmed*.

James, Huston & Taylor, for appellant.

Hughes, for appellee.

G. K. SLOAN'S ADMR. v. T. B. WALTERS.

Evidence—Competency of Witness—Suit on Note..

In a suit by an administrator against Walters on a note for \$300, assigned by Talbot, Walters called Talbot as a witness to establish payments. Should the administrator recover the whole amount of the debt would have gone into judgment; and if Walters had failed in establishing his defense, Talbot would have been responsible to him for such payments. Held, that Talbot's interest being against Walters, he was a competent witness for him.

APPEAL FROM NELSON CIRCUIT COURT.

September 11, 1868.

OPINION OF THE COURT BY JUDGE WILLIAMS:

Opinion of the Court.

Talbert having assigned to G. K. Sloan, Walters' note for \$300, which was executed to him, was called by Walters to establish his defense of payment partly to Talbert, which was objected to by the plaintiff, but over-ruled by the court, and exceptions.

Appellant insists that Talbert's interest was not in equipoise, and therefore, he is not a competent witness.

In a suit between Sloan's administrator against Talbert on his assignment, he could not use the record to show the character of that assignment, and if Sloan's administrator should recover, the measure of recovery would be the amount paid, or, in the absence of all proof as to this, the amount of the debt assigned with interest thereon and the legal costs recovered of him in prosecuting this suit, whilst had Walters failed in establishing his defense, Talbert would have been responsible to him only for the amount received from him subsequent to the assignment, with interest thereon, but no costs; therefore, the legal interest of Talbert was against Walters who called him to testify, and he was clearly competent. As to his preferences and partiality, that would go to his credibility in the consideration of the jury. As he was corroborated in a material point by another witness as to the motive and consideration of the assignment, we could not disturb the verdict and judgment on the evidence. We think the instructions properly expounded the law of the case, but if they did not no objections were made nor exceptions taken to them. Wherefore the judgment is affirmed.

Bunch & Lee, for appellant.

McKay, for appellee.

HARRIET G. EVANS ET AL v. ABNER HORD.

Executors and Administrators—Violation of Fiducial Trust—Liability for Loss Thereby.

An executor, who loans money of his testator, and by a transfer of the note thus taken, secures other notes from different parties, which latter notes prove worthless on account of his dereliction of vigilance, is held liable personally for the loss thus sustained to the estate.

Same.

Executors must properly protect the debts due their testators estate and, on a note, of an insolvent, where no attempt is made to properly secure it, or ask for a pro rata allowance out of the assigned property of a surety, or actual demand of the principal, is held to be a violation of the trust.

APPEAL FROM FLEMING CIRCUIT COURT.

April 22, 1869.

OPINION OF THE COURT BY JUDGE WILLIAMS:

A. Parer, deceased, by his last will bequeathed to his sister, Harriet G. Evans, and her children, among other things a debt of \$11,000—then in due time by Blackburn secured by mortgage on a Woodford county farm, also a fund in his hands as trustee left by his father to his said sister \$2,056.98, all to be put out at interest payable semi-annually, making Abner Hord a trustee and in case of his death S. Girard Hord, trustee, to loan out said funds, and to pay Mrs. Evans the semi-annual interest. By the ninth clause of his will he authorizes his *executors* to continue the loan of eleven thousand dollars to Blackburn at six per cent, but if he shall elect to pay it then the *trustee* may invest it in steel stock or loan it by mortgage on real estate, and appointed Abner Hord his executor.

A debt of \$2,247.31 on R. R. Bell and George Jones, his security, being lost by the insolvency of the obligors, which Hord asserts to be part of the trust fund and claimed and got a credit therefore with the county court. Mrs. Evans and her children brought suit averring that this was an imprudent and unsafe investment and that it had been lost by want of proper vigilance.

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by Hord and that in the first instance it had been a private debt of said Hord and that he had because of its doubtful character transferred it to the trust fund, and thereby attempted to throw its loss upon them. Issues were formed on these pleadings, the evidence heard and the cause submitted on two isolated questions, to-wit, whether Hord was responsible for the Bell debt, and whether he was responsible for more than the legal interest which he had reported on the Lander debt.

The debt of \$11,000 seems to have been collected of Blackburn soon after the testator's death, which occurred previous to July, 1850.

It is insisted in argument that it was a breach of trust to loan this fund on any other security than mortgage on real estate, or to invest it in steel stock; it is sufficient, however, to say that no such cause of action is alleged or set up in the petition, therefore we cannot consider it.

Hord's responsibility for the Bell debt, under these pleadings, must be confined to the question of reasonable diligence and care in creating this debt and its management after it was created.

The note of Bell, with George Jones as his security, for \$2,000 principal is dated September 17, 1861, due at one year.

Another note of same date for \$100—due in six months for the semi-annual interest was executed by them; and another note for \$85 was secured the same day by Bell, alone, due in one year for the next semi-annual interest.

Hord, in his answer says, he exchanged this note with Early for a note on Robinson and this latter he exchanged with his son A. P. Hord, for a note on King, as he says his son had purchased Robinson's farm and holding King's note he exchanged Robinson's note with him for it.

It is quite apparent that these exchanges of notes were to benefit and accommodate his son, A. P. Hord, for if the original investment was good there could have accrued no benefit to the beneficiaries, but as each exchange complicated the transaction, and if the trust funds must be held liable for the trustee's assignment, it thereby becomes endangered.

Jones as early as February 24, 1862, some five months after said note of Bell to the trustee was secured and before it was due, made an assignment of his property which seems to have been barely sufficient to have made this note good, even if he had

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owed no other debts, but which were more than sufficient to absorb his property without any *pro rata* to this one, and by the consolidated judgments in the case of Bell's creditors against him it appears that all the attachments sued out February 2, 1863, were made out of Bell's property.

So here is a fiducial debt remaining without security from the date of Jones' assignment, February 24, 1862, until February 3, 1863, with no attempt either to get a *pro rata* allowance out of Jones' property, or demand on the principal, so far as appears, to supply a new security. And if the previous assignment of the note be set up as an excuse for this dereliction of vigilance, it would only show that the assignment itself, by putting it out of the power of the trustee to control it, was a violation of the trust.

We are satisfied from the evidence that Bell was to all appearance a good, safe borrower when this debt was made and so continued up to about the time when his property was attached; his credit seems not to have been impaired until his unexpected and rather eccentric departure from his home, in Fleming county, where he owned a valuable farm of some 400 acres and other large and valuable property; and we have but little doubt that he could and would have supplied Jones' place with a good and valuable security at any time after Jones' assignment had he been called on to do so.

Taking all these transactions together we have no doubt but that Hord should be held responsible for this Bell debt. The trust debt on Robinson remained good and was paid and this shows the injustice of its exchange without any possible profit to the beneficiaries.

As to the usurious interest on the notes of Lander set out in the petition it appears that he escaped from the payment of the usurious part and although Hord had also assigned his notes, yet as the amount was not actually collected but rejected by the court on Lander's appeal we do not see how Hord could be held responsible thereon. But we infer from the pleadings and otherwise that there may have been a previous transaction to these notes copied in the petition in which Mrs. Evans was made to assert her beneficial claim and in which usurious interest was collected because Lander could not or did not sustain his plea, and if so, Hord should be held responsible for this, but all this, now, too vaguely appears for our adjudication, therefore, as to this matter additional

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pleadings may be allowed to either party and another reference as to it may be made to the commissioner to ascertain and report thereon.

Wherefore, the judgment is reversed, with directions to adjudge against appellee, Hord, as to the amount of the Bell note for which he obtained a credit with the county court and interest thereon from the time and as of the date of his credit, and for further proceedings as herein indicated.

Cord, Andrews, Wadsworth, for appellants.

Phister, Botts, for appellee.

MORTON SCOTT ET AL v. W. S. SCOTT'S EXECUTRIX.

Executor and Administrator—Right to Institute Action by Executrix on Note Made to Deceased, as Executor.

Though an executrix, cannot, as such, maintain an action on a note made payable to her testator as executor, unless the petition is demurred to, or objection made in their answer, defendants will be deemed as having waived the objection.

Same—Settlement of Accounts.

Where an executor and the distributees make and agree on a settlement of the estate between them, they will not be allowed to reopen and controvert items in said settlement, in a suit between said distributees and the executrix of the testator and former executor.

APPEAL FROM JESSAMINE CIRCUIT COURT.

April 15, 1869.

OPINION OF THE COURT BY JUDGE PETERS:

It may prove as satisfactory to state the conclusions to which the court has been brought by a careful examination of the record, as it would be, to amplify the reasons for these conclusions. The conclusions will therefore be briefly stated.

It is however proper to dispose of two preliminary questions.

1. It is insisted, that as the note which is the foundation of the

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action was executed to William S. Scott, executor of Thomas B. Scott, deceased, that his executrix, who is the plaintiff in the action, cannot as such executrix, maintain the action. And that question is elaborately debated by counsel for appellants.

To the petition, appellants failed to demur, although the objection appeared on the face of it. Nor did they make the objection in their answer that appellee could not maintain the action in her name as executrix. Consequently, appellants cannot be heard now to complain that appellee has no capacity to sue. They must be deemed to have waived the objection. *Sec. 123, Civ. Code.*

The *second preliminary* question comes from appellee, that as this was not a suit to settle the estate of Thomas B. Scott, the testator, the court below should not have credited appellants by their distributable shares of said note.

That objection certainly does not come with any grace from appellee. Her testator lived more than eight years after his qualification as executor of his father, and more than five years after the maturity of the note, and had failed to settle his executorial accounts, nor had appellee settled her accounts, although nearly eight years had elapsed from the death of the testator to the bringing of this action.

The whole period being over 16 years from the qualification of her testator to the institution of this action, without a final settlement. And besides, in the settlement made in 1853 by her testator with appellants, he allowed them a credit on the note then due for their distributable share of said note. Showing that he regarded the debts of his testator as paid and the devisees entitled to their respective parts of their father's estate. And it may be presumed that an agreement existed between the parties that appellants should be credited on their note by their respective portions under the will at the making of the contract.

The settlement of the 1st of August, 1853, appears to have been made with great care, and to have been thoroughly understood by the parties, and no errors or mistakes in the same are alleged, or suggested, in their pleadings by either party, but a slight mistake in the calculation of interest was presented by Samuel Scott to W. S. Scott very soon after said settlement was made, which seems to have been admitted by the latter, and as that settlement was acquiesced in as thus corrected, it must be treated and regarded as a final settlement of all open accounts, or claims, naturally

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existing, except such as were then stated to be unsettled, up to its date. Consequently the claim for wood and corn in the account for 1853, presented by appellants with their answer was properly disallowed by the court below.

The last item of \$244 for wood does not show in what month, months, or season of the year the wood was delivered, and as appellants do not show the delivery was after the settlement, the court cannot assume it was afterwards and give credit for it.

The evidence as to the delivery of the corn and beef charged in the account of 1854, is very indefinite and uncertain and we cannot say therefore that the court below erred in refusing to allow a credit therefor.

And thus the same may be said of the bills charged in the account of 1855. There is no charge for wood in the account for 1854, 1855 and 1856, but in the account for 1857 there is a charge for wood sold Wm. Scott. And James O. Henry proves he hauled 57 cords of wood to him from appellant's farm, which testator told him he got of them in the tree, and had it cut and split, and he proves what the wood was worth and that he hauled it.

The claims for credits for money collected by appellee's testator from Rice for the Woolfolk farm, which Mrs. Rice and Mrs. Estill were entitled to, will be next considered.

The master's report shows the amount of Rice's notes with interest on them to the date the note sued on was due, to be\$4,457.67
 Mrs. Roberts and Mrs. Estill were entitled to 2-3
 of that sum, or\$3,105.11 1-3
 On the settlement made by the parties and approved
 by their signatures, dated 21st of November, 1851,
 and in which the note first due for the land was set-
 tled, appellants were credited by amount received
 for Woolfolk farm\$1,355.60
 And on the settlement of the 1st of August, 1853,
 of the note for the second payment of the land, they
 are credited by \$602.00
 On the last named date Mrs. Roberts and Miss N. E.
 Scott, now Mrs. Estill, receipted to W. S. Scott for
 money collected of Rice\$1,362.95
 On the 26th of September, 1851, Mrs. Roberts exe-
 cuted a receipt to him for money received of Rice.. \$701.64

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and on the same day Miss N. E. Scott receipted to him for the same amount 701.64

Making in all\$4,723.83
Deduct amount they were entitled to 3,105.11 1-3

Making this sum more\$1,618.71 2-3
than Rice's whole indebtedness amounted to. It must be that some of said receipts were given for credits which had been allowed on one or both of the notes settled in the life time of William Scott; but how it really is, the record before us does not explain, which might have been done perhaps by taking Rice's deposition, but that was not done, and this court cannot venture to adjust it without evidence.

For the mistake in the settlement of August 1st, 1853, in the calculation of interest of \$22.59 appellants were paid as is shown by exhibit dated 12th of August, 1853, signed by R. S. & William Scott.

A part of the price of the crop of hemp raised in 1852, viz: the sum of \$662.35, was applied to the discharge of the note for the second payment for the land. And the residue of the crop for that year, viz: the sum of \$572.16, was to have been credited on the note now in contest. The crop of hemp raised in 1853 amounted, as the masters report shows,

to	\$629.33
That of 1854	845.93
That of 1855 to	1,326.83
Add the balance of the crop of 1852	572.16

Total hemp crop to 1855 inclusive\$3,374.25
Appellants cannot now be credited by the whole of this sum, because on the 12th of February, 1854, testator sent in a check to Samuel Scott in Missi., one of the firm, \$1,200, within \$1.49 of the full amount of the crop of 1853, and the balance on the crop of 1852, which in absence of evidence to the contrary must be regarded as payment therefor.

On the 23rd of May, 1855, he sent to his brother Samuel, then in Missi., another check for \$900, the crop of 1854 amounting to only \$845.93, making the sum of \$54 more than that crop came

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to. And on the 17th of July, 1856, he paid to R. S. Scott \$880 on the crop of 1855, as the receipt for the same expresses, and on the 29th of August, 1856, he paid him the further sum of \$186.53 on said crop; these receipts acknowledge payments in cash; the court below therefore properly rejected all credits for the crops of hemp for those years, except the difference between what they amounted to, and said payments, which is as follows:

Total amount of hemp crops	\$3,374.25
Total amount of payments	3,166.53

Making a difference in favor of appellants of...	\$207.72
to which add price of wood hauled by Henry....	39.75

Makes the credit just \$247.47
the sum the court below allowed—but the credit was given in the judgment of the date of the note and this we approve because there was more than that sum due on the crop of 1852, before any payments were made, and interest allowed by the master was properly rejected.

Keith proves he got the crops of hemp raised in 1856, 1857 and 1858, and there is therefore no pretext for claiming credit for those crops.

Appellants are entitled to credit on the note for their respective portions, as devisees of Thomas B. Scott, and the court below so determined. It is not shown that there are any outstanding debts against the estate, and appellee's testator credited then with the 5-10 or one-half of the note for the second installment on the land as their share thereof as devisees. But the court below credited them by the sum of \$596.69 as the share of each, aggregating the sum of \$2,983.45 as the full amount to which they were entitled. There were ten devisees of Thomas B. Scott—appellants are entitled to 5-10 or one-half of what is to be divided. The note is for \$7,051.25, the one-tenth of which is \$705.12½, and the half of the amount of the note would be \$3,525.62½, and no reason is perceived why appellants are not entitled to a credit for this sum less a commission of 5 per cent as an allowance to appellee's intestate which is \$176.25. The court below therefore erred in not allowing them credit for \$3,349.39 of the date of the maturity of the note, instead of \$2,983.45, making a difference in favor of appellants of \$365.94. Appellee's testator allowed

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them a credit for the full half of the note for 2nd payment as their distributable share thereof on the settlement he made with them.

John Scott proves that William S. Scott as executor of his father owed him \$397.79-100 the balance of his legacy, and that appellant Morton Scott paid him that sum for said executor on the 27th of January, 1854. There is no evidence that this money was ever refunded to Morton Scott, or to any one of the obligors in the note; they were then indebted to William S. Scott as executor and it is probable, indeed scarcely to be doubted, that the payment was made to John Scott for the executor, and to be credited on said note, and the credit should have been given as of the 27th of January, 1854.

The court below also erred to the prejudice of appellee. The credit for \$330.75 was properly allowed, but it was erroneous to fix the date of that credit at the time the note sued on fell due, the payments were not made until December, 1862, or it may be January, 1863, and that credit should have been dated as of the 1st of January, 1863.

For the errors herein pointed out alone the judgment is reversed on the original and cross-appeals, and the cause is remanded with directions to correct the judgment, as herein indicated, and for further proceedings not inconsistent with this opinion.

Lindseys, Bronaugh, for appellee.

Messick, James, for appellants.

J. G. GUTHRIE'S ADMR. v. E. ANN GUTHRIE.**Affidavit—Waiver—Objections.**

The absence of an affidavit to claims filed by a defendant in a cross petition, is held to be waived by failing to object to same before the trial, and after judgment, the objection comes to late.

Husband and Wife—Use of Wife's Property—Interest.

As the husband has the joint use of the wife's property during their lives, his estate is chargeable with interest on the use of personal property of the wife after his death, only.

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APPEAL FROM HARDIN CIRCUIT COURT.

March 20, 1869.

OPINION OF THE COURT BY JUDGE PETERS:

The verification of the claim of appellee was waived by failing to object to it before the trial, and after judgment the objection comes too late.

Cofer, the first administrator of G. Guthrie, brought an action for a settlement of the estate of his intestate, pending that action he was removed and Pusey was appointed. After his appointment appellee and the heirs of decedent brought a suit for a settlement of the estate against the second administrator, and that action was consolidated with the one Cofer had previously brought, and in which appellee made her answer a cross-action, and set up her claim for the money for which her slaves had been sold by her late husband. Pusey, the last administrator, was properly before the court, and failed to answer her cross petition, and Cofer failed to answer while he was administrator. The court below therefore correctly took the same for confessed, and no formal dismissal of the cross bill against the heirs was necessary.

But the judgment allowed interest on the amount recovered from September, 1853, this was erroneous. It is not alleged in the cross-action when the negroes were sold, the husband could use them during the joint lives of himself and wife, and in any event his estate should not be charged with interest until after his death, and we think she should be entitled to interest only from the time she filed her cross-action on the 21st of May, 1863.

Wherefore, the judgment is reversed and the cause is remanded with directions to render judgment for \$900, with interest from the 21st of May, 1863, until paid.

Cofer, for appellant.

Malthis, for appellee.

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CHARLES NEWBURG *v.* NATHAN RATLIFF

Witness—Competency.

One, who is remote vendor of an appellant, is held to be a competent witness for him, and his evidence being material, and not known what effect it would have with the jury, the court erred in rejecting his depositions.

APPEAL FROM PIKE CIRCUIT COURT.

February 16, 1869.

OPINION OF THE COURT BY JUDGE PETERS:

Although the instructions submitted to the jury were proper, and the evidence, as admitted, preponderates in favor of the verdict, still the preponderance is not so decisive as to authorize an affirmance of the judgment, notwithstanding the rejection by the court below, as incompetent, the deposition of John H. Allison, remote vendor, offered by appellant.

In *Carbon & Bettis vs. Stout*, 2 Bush, 246, where the same question arose, this court, after citing a string of authorities to the point, said:

"The possible interest of Turnbull was not direct, certain or immediate, and consequently, could only affect the credibility of his testimony *when heard*, the spirit of our code harmonizing with the genius of the age inclines more than the common law, to let interest discredit, rather than disqualify, a witness."

Allison being only a remote vendor of appellant, was a competent witness, and as his testimony was material and it cannot be known what effect it may have had with the jury, the circuit court erred in rejecting his deposition. But no other error is presented in the record. For the error named, however, the judgment must be reversed, and the cause remanded, with directions to award a new trial, and for further proceedings not inconsistent with this opinion.

L. T. Moore, Auxier, for appellant.

O. C. Bowles, for appellee.

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SIMPSON STURGEON v. T. CONN.

Lands and Conveyances—Possession under Division by Parties—Descent and Distribution—Title in Severalty.

A division of lands, descending to devisees, having been made by actual survey, the parties entering upon their respective parts, separated by a distinctly marked line, and thus held continually is held that the possession thus operated to sever the joint title, and to clothe each one with the title in severalty, freed from all incumbrances on account of any supposed title in a co-devisee.

Pleading—Failure to Answer Allegation in Petition.

The failure to deny the charge in a petition, of a deed having been given for land, (and last, admit its correctness), and will act as a bar to a denial of a continuous chain of title, in a subsequent suit.

Adverse Possession—Not Interrupted by Decree of Court.

Though a decree of court may limit the legal title to land to only one half a designated amount, one in possession of the whole tract for a continuous period of more than twenty years by a hostile holding including the time of the litigations thus stated, will be held to have a good title by adverse possession.

Same.

The possession of the whole tract is not interrupted by the decree of court, nor converted into a friendly holding, and this possession for twenty years will bar a right of recovery.

APPEAL FROM LOUISVILLE CHANCERY COURT.

March 1, 1869.

OPINION OF THE COURT BY JUDGE PETERS:

On the 20th of September, 1866, this action was brought by appellee against the devisees and executors of Mrs. Jane Sturgeon, alleging that Robert Sturgeon, her husband, died in 1837, the owner of about 300 acres of land in Jefferson county. That by his will he devised 25 acres of said tract to be taken off a designated end to his son Thomas Sturgeon, and the residue of said tract he devised to his sons Moses and Simpson Sturgeon.

That the testatrix under her execution sale and decree of the

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Louisville chancery court in case "5969" referred to and made part of the petition, acquired title to an undivided moiety of 115 acres of said land, being the interest of Moses Sturgeon *then* deceased in the said 115 acres. That in obedience to said decree, the commissioner of said court conveyed the moiety of said land to the testatrix. But that by her will she had directed the whole 115 acres, describing it, by metes and bounds, to be sold, and the proceeds to be distributed to her devisees, claiming the whole tract, when she was in fact under the said sheriff's sale and decree of the court entitled to only an undivided half thereof.

That Moses Sturgeon died unmarried, and childless, seized of one undivided moiety of the tract devised to himself and brother by their father including the undivided moiety of 115 acres or $57\frac{1}{2}$ acres which has been in possession of said Jane Sturgeon as her dower, and also in Simpson Sturgeon's possession as coparcener, and, that on the death of Moses, all his interest passed to his "six brothers and sisters"—the names of whom are given.

He then alleges that he is the owner of the interest of Bryant and wife (Mrs. Bryant being a sister of Moses Sturgeon) by their conveyance to him, copy of which he files; that he now owns the interest of Thomas Sturgeon, whose bond for a conveyance he has, and files, and that he also has contracted with John H. Wood and wife, Mrs. Wood being a sister of Moses Sturgeon, for their interest, and has their bond for a title, which he files as an exhibit, and prays for a partition of the whole tract owned by Robert Sturgeon, the testator, by first laying off and setting apart to Thomas Sturgeon 25 acres as directed in the devise to him, and then dividing the residue equally between Simpson Sturgeon and the heirs of Moses Sturgeon, and then of the half set apart to said heirs to lay off $57\frac{1}{2}$ acres thereof to the devisees of Jane Sturgeon, and divide the balance equally amongst the heirs of Moses Sturgeon, deceased, giving to him $\frac{3}{7}$ thereof, which he claims under his several purchases from a brother and two sisters of said decedent.

By an amended petition, appellee alleges that since he commenced his action John Harvey Sturgeon, a brother of Moses, had died, who was entitled as one of his heirs to one-seventh interest, and by virtue of his purchase from Thomas Sturgeon he is entitled to $\frac{1}{7}$ of said John Harvey Sturgeon's $\frac{1}{7}$ as an heir of Moses, and asks that it may also be set apart to him.

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On final hearing, the chancellor adjudged to appellee 19-42 of 57 1-2 acres of said land, and directs his master commissioner in the manner in which the division is to be made, and this appeal is prosecuted to reverse that judgment.

Simpson Sturgeon in his answer, after denying the right of appellee to any part of the land, avers that in the year 1840 commissioners were appointed for the purpose, and went upon the land devised to them by their father, and divided it between himself and his brother Moses; a surveyor being one, a dividing line was run and established between the two parcels, assigning to Moses 115 acres, and to him 145 acres, Moses getting the improvements; his part being nearly all woodland, and on that account a greater number of acres were assigned to him; that a report of the division was made out and signed, and both parties being satisfied therewith, each one immediately entered on their respective parts, and the same have been held and occupied in severalty continuously from the time of the division in 1840 to the present time. That from the time of the sale made of the 115 acres assigned to Moses under an execution against him and others and the purchase thereof by his mother, she had been in the actual possession of it to her death, claiming the whole of it as her own, and adverse to all other claims, and disposed of it by her will.

The bond from Wood, the husband of a sister of Moses Sturgeon, to appellee bears date the 27th of October, 1845. That of Thomas Sturgeon to him is dated 4th of February, 1851. And the deed of Bryant and wife to him the 13th of December, 1845.

It appears from a copy of an execution filed as an exhibit in the cause that the same was issued on the 13th of May, 1843, from the office of the Jefferson circuit court, against Moses Sturgeon, Jane Sturgeon and two others, in favor of Vance & Marders for upwards of \$100, and was placed in the hands of the sheriff of said county the same day it was issued, who returned that he levied it, on all the right, title and interest of said Moses and Jane Sturgeon in and to 115 acres of land in Jefferson county, giving the boundary which was given up to him by a writing executed by them which he returned with the execution, from which it appears that they did surrender the 115 acres including the dower right of said Jane, and the whole tract was sold by the sheriff on the 10th of August, 1843, when the plaintiffs in the execution became the purchasers for the amount of their debt;

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and on the 3rd of September, 1844, for value received, they transferred their purchase to Mrs. Jane Sturgeon.

In 1848, Mrs. Jane Sturgeon filed her bill in the Louisville chancery court, setting forth the sale of the 115 acres of land, and the purchase thereof as hereinbefore stated, and alleged that her son Moses died in August, 1844, indebted to her in a considerable sum of money, that appellee was his administrator, whom, with the brothers and sisters of said Moses, she made defendants, and prayed for a conveyance of the land to her, and asked that appellee should be compelled to settle his administration accounts, and for the satisfaction of her demands against the estate of Moses Sturgeon; Vance, Marders and the sheriff who made the sale, were also made defendants. She alleged that Vance had executed a deed to her for the land, and it was left in the clerk's office of the Jefferson county court for the signature and acknowledgement of Marders, but he never signed it.

Appellee filed his answer to the bill, which he made a cross-bill against the complainant, and some of his co-defendants, in which he admits the sale of the land under the execution, that Moses died within one year after the sale and charges that his mother made the arrangement with the plaintiffs in the execution for the redemption of the land before the time to redeem had expired; but had the evidence of her right to redeem dated after the expiration of the year for the fraudulent purpose of securing the title of the land to herself, and then devoted the residue of his answer to statements relating to the personal estate of Moses Sturgeon, deceased; charges the complaint with having converted a portion of it, and he also prays for a settlement of his administration accounts.

The complainant answered his cross-petition against her, controverts all charges made against her in relation to the use or conversion of any part of said intestate's estate. And making the same also an amendment to her original petition, charges that the deputy sheriff who made the sale of the land under the execution of Vance & Marders joined with Vance in a conveyance of the land to her; that Ben R. Pollard wrote the deed; that she bought the land for her own use, and the deed, after being signed by Sturgeon, the deputy sheriff and Vance, was left in the office aforesaid for the signature of Marders, and was by some means lost; and charges that appellee, as she had been informed, had bought the claims

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of her three children named to harass her, for very inconsiderable sums; charges that she has been in possession of the land ever since the sale to her, claiming it as her own, and prays for the relief sought in her original bill.

The appellee answered that amended bill, admits that he bought the three interests named, but denies that the sums paid were inconsiderable; states he paid for each share \$125; denies that he made the contracts for the purpose of harassing her, and says her claim to the land is a mere pretended and void one. But wholly fails to deny that the conveyance was made to her by the deputy sheriff and Vance, or that she was in possession of the land, nor a surrender of any part of it to him or his vendees.

The principal litigation in that suit was between Mrs. Sturgeon and appellee, and on the 21st of November, 1851, resulted in the following decree:

"It seems to the court that there was not such partition of the tract of land as would allow any but a moiety to pass by the sheriff's sale. And it further seems to the court that the purchase of Vance and Marders was after the time of redemption had expired.

"Wherefore, it is ordered that the late sheriff, and said Vance and Marders, do convey the said moiety of land to the complainant, and this cause is referred to the commissioner to report the state of accounts between the estate of Moses Sturgeon and the complainant charging her with such property of his estate as she has used, or sold, and also to settle the accounts of T. Conn, administrator of said

Moses, and report also the amount of debts that may be yet owing by said estate. But the court now decrees that there is no debt owing to said Bryant."

At another term of the court the master was ordered to convey the half of the 115 acres of land to Mrs. Jane Sturgeon, on the part of the sheriff and Vance & Marders, they having failed to convey. And on the 2nd of October, 1852, the conveyance was made by the master as directed. And nothing more ever seems to have been done in the case.

This prolonged history of the case seemed necessary to a clear presentation of the questions involved.

For appellee it is insisted that the decree of 1851 recited was final, and the deed made in obedience to it now irrevocably fixed

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and limited the right of Mrs. Sturgeon to 57½ acres of the land, and the residue of the tract necessarily passed to the heirs of Moses Sturgeon on his death—three of whom he had bought out, and was entitled to their shares.

It is not shown that the commisisoners who made the division of the land were appointed by the county court, and it must be admitted that the division made by them was *as the act of the court*, of its *commissioner*, wholly inoperative to destroy the joint estate which Moses and Simpson Sturgeon took by the will of their father and to sever their joint title. Still it is conclusively shown that the division in fact was made in 1840, and the parties then entered upon their respective parts, separated by a distinctly marked line, and each one held up to this line an exclusive possession, under claim of sole and severed and several title, Simpson up to the trial of this cause, and Moses, and his mother, and those under her, to the same time.

The effect of the possession thus taken and held was to sever the joint title, and to clothe each one with the title in severalty, freed from all encumbrances on account of any supposed title in a co-devisee.

Drane vs. Gregory's Heirs, 3 B. Mon., 619; Parker's Heirs vs. Anderson, 5 Mon., 450.

Waiving the consideration of the effect of the deed by the sheriff who made the levy and sale of the land, to Mrs. Sturgeon, which she alleges, and proves, and which appellee does not deny, and of which according to the evidence he had notice, and conceding that the decree of 1851 and the deed under it limited her title acquired by her purchase to 57 1-2 acres, still her adverse possession of the whole 115 acres, commenced in 1844 as is alleged and proved, and it was continued without interruption for more than twenty years before the commencement of this suit.

Her possession of the whole tract was not interrupted by said decree, nor converted into a friendly holding, but her hostile attitude to appellant, as to the land, was made manifest in that suit. And the effect of the possession thus held by her, and transmitted to her vendees, must operate as a bar to appellee's claim.

Wherefore, the judgment is reversed, and the cause is remanded with directions to dismiss the petition.

Bullitt, Pope, for appellant.

Stirman, for appellee.

Opinion of the Court.

JOHN R. H. PALMORE v. NANCY CHAPMAN ET AL.

Contract—Parent and Child.

An alleged contract, by parol agreement between father and son, no writing of any kind having ever been made, held too vague for judicial action and unenforceible.

APPEAL FROM MONROE CIRCUIT COURT.

October 13, 1868.

OPINION OF THE COURT BY JUDGE PETERS:

There is no written memorial of any contract between appellant, and his father as to the terms upon which he went to live with the old man, and the parol evidence of what those terms were is far from being satisfactory, and when the whole evidence in the case is considered, the transaction is clouded with too much doubt, and uncertainty to found judicial action on it.

In the last two years, or 18 months of the old gentleman's life he was to a great extent helpless; and for some months previous to his death required much attention, and nursing, which perhaps apart from the filial duty appellant owed his father would have been irksome, and even too disagreeable to be hired to perform; but for many years after he went to reside with his father, he continued to labor, and even within a year before his death he attended a horse mill on the place, and appellant received all the proceeds of his labor, and the products of the farm; which would contribute, if not completely to remunerate him for his care and attention to his father in his last illness.

Moreover, if the contract was made as alleged, it is a fact worthy of notice that there is not only no written evidence of it, but there is no reason offered for failing to have such a writing.

Appellant can derive no benefit from the patent he procured to be issued to himself for the land, his father purchased it and had held it for more than 20 years claiming it adversely before he went there to live, the presumption is that it had been patented long before the date of appellant's patent, and he entered and held under his father.

Opinion of the Court.

Judgement *affirmed*.

Rodman, for appellant.

W. S. Maxey, for appellee.

E. M. JOHNSON *v.* HENRY AMENT ET AL.

Petition—Pleading—Demurrer.

A petition constituting a cause of action, followed by an amended petition, which does not, is not demurrable by a general demurrer to all.

APPEAL FROM HARDIN CIRCUIT COURT.

October 13, 1868.

OPINION OF THE COURT BY JUDGE PETERS:

The amended petitions in these consolidated cases seem to have been filed to assert, and enforce a lien on the land for the payment of the notes sued on, which as therein alleged, were given for the price, or a part of price for said land; and the causes of action, as therein alleged, were insufficient to authorize a judgment, and demurrer to said amended petitions, if such had been filed, should have been sustained. But the original petition stated facts which constituted causes of action, and uncontroverted would have entitled appellant to personal judgments. And therefore, as the demurrers were *general*, and applied to the original as well as to the amended petitions, it was erroneous to sustain them, and dismiss the actions. Wherefore, the judgments are *reversed*, and the causes remanded with directions to over-rule said demurrers, and for further proceedings consistent herewith.

Cofer, for appellant.

Wintersmith, for appellee.

Opinion of the Court.

NANCY BRADY v. THE STEAMER ARMADA BURNS ET AL.

Jurisdiction—Action for Trespass by Master of a Steamer.

An action of trespass may be maintained against the master of a steamer, for wrongs committed, though no action therefor could be maintained against the boat except in the Admiralty Courts of the United States.

APPEAL FROM UNION CIRCUIT COURT.

September 15, 1868.

OPINION OF THE COURT JUDGE WILLIAMS:

The petition is against the steamer Armada Ann Burns and J. V. Throop as master, and as to the boat and her owners it is a proceeding in rem for a massive tort. Who the owners, or what their names, are not designated in the caption nor the petition, nor is there any process against them as individuals.

As to the boat and her owners the case comes clearly within the principles announced by the Supreme Court of the United States in the *Hines vs. Treno*, 4 Wallace, 355, and as decided by this court in *Stuart vs. Hany*, 3 Bush. And belongs exclusively to admiralty jurisdiction, and the demurrer was properly sustained.

But as to Throop the petition sets out a case of trespass clearly remedial by the common law and therefore is not a mere marine tort to be remedied by a proceeding in rem in the admiralty courts of the United States, but is one for which he may be held personally responsible by suit in any court having common law jurisdiction.

It is true that slavery was not recognized by the common law, yet slaves being personal property by the positive law of Kentucky any violation of the owners' legal rights thereto, within her jurisdiction may be redressed by common law remedies as has often been held in the courts of this and other states.

Wherefore, the judgment sustaining the demurrer as to the "Armada Ann Burns" is affirmed. But as to J. V. Throop it is reversed with directions to over-rule it is to him and for further proceedings as herein indicated.

Huston, for appellant.

Spalding, McElroy, Bush, for appellee.

Opinion of the Court.

R. H. SHUCK ADMR. v. J. H. LAWLER.

Off-set—Account—Prima Facie Evidence of Settlement.

Items of an account, pleaded as a set-off in a suit on notes, and which were created before the date of the notes, the execution of the notes is prima facie evidence that said accounts were thereby settled.

APPEAL FROM OWEN CIRCUIT COURT.

January 15, 1868.

OPINION OF THE COURT BY JUDGE PETERS:

The only question presented by this record is as to the propriety of the action of the court below in granting the instruction asked by appellee, and refusing those asked by appellant.

If there is any evidence in the record directly or from which it can be reasonably inferred, as assumed in the instruction given for appellee, that at the time the notes sued upon were executed, there was an agreement between appellant's intestate, and appellee, that the accounts of the latter should be left out of the settlement then made, to be settled at a future day, it has escaped this court. Wainscott proves he heard Sparks say to appellee in May, 1864, to get up his accounts, and when he came over he would settle them. And he furthermore proves that a paper shown to him dated the 5th of May, 1864, the date of the first note executed by appellee to Sparks contained the valuation of the furniture but whether the difference in the value of the furniture as shown by that paper was settled or not, he does not prove, but on the next day appellee executed a second note to Sparks, for a little over half the amount the note executed the day before is for—both are payable one day after date; why the two amounts were not put together and included in one note on the 5th of May, 1864, is not explained—and this court will not indulge in conjectures to account for it; but in the absence of sufficient evidence of an agreement for a future settlement, the instruction given for appellee was abstract and was not authorized.

Nor can we concur with the court below that the instructions given in place of those asked by appellant were the correct ex-

Opinion of the Court.

position of the law. If the items of the account pleaded as a set-off were created before the notes bear date, the execution of the notes is *prima facie* evidence that said accounts were then settled, and that appellant was indebted to Sparks in the sums named in said notes, which may be rebutted by evidence that they were not then settled.

As the instructions given do not conform to the law of the case, the judgment must be reversed, and the cause remanded with directions to award a new trial and for further proceedings consistent herewith.

Lindsey, for appellant.

Scott, for appellee.

THOMAS PORTER v. MARY ANN CUMMINS.**Adverse Possession—Sufficient Deed—Contract.**

A deed from a vendor, who had held land in controversy through undisturbed adverse claim for a period of forty years, is held to be a sufficient compliance with a contract to give "a good and sufficient deed."

APPEAL FROM KENTON CIRCUIT COURT.

October 3, 1868.

OPINION OF THE COURT BY JUDGE HARDIN:

As we construe the agreement between the appellant and the appellee dated the 3d day of June, 1857, the undertaking to pay the last payment of \$1,000 of this purchase money was upon the condition that the appellee Mary Ann Cummins, then Mary Ann Cox, should convey the title by a good and sufficient deed with her own warranty of the title, and the principal question presented for our decision is whether the deed tendered by her after the death of her husband was sufficient to vest the title in the appellant in compliance with her contract. We are of the opinion that it was.

It does not distinctly appear how the land was originally ac-

Opinion of the Court.

quired by the appellee's grand-father, Richard Dictim, from Flournoy, but as it fully appears that for near forty years the land had been held and claimed under the title of Dictim and adversely to all other claims, we think the title should have been regarded as sufficient, and especially so as a conveyance was adjudged from the heirs of Flournoy by proper proceeding against them. It seems to us also that as the appellant or his vendees had the use of the land there was no error in adjudging the payment of interest on the \$1,000 from the 3rd day of June, 1861. Nor was there any error, in our opinion, to the appellant's prejudice in the equitable adjustment made by the court, as to the payment of costs.

Wherefore, the judgment is affirmed.

Carlisle, for appellant.

O'Hara, for appellee.

E. B. MILLER'S ADMR. v. MAXVILLE, ET AL, TURNPIKE ROAD
COMPANY ET AL.

Orders, Drawn on Treasurer by Secretary—Evidence of Indebtedness—Corporations.

An order drawn by the secretary of a turnpike company, on the treasurer, is evidence of an indebtedness of the amount of same from the drawer to the payee.

Same—Liability of Drawer, where Funds of Company come into his Hands.

It is the duty of an officer of a corporation, who had given his payee an order on the treasurer, and accepted, payable out of a certain fund, to set aside so much thereof as is necessary to liquidate same, when said certain funds come into his hands as such officer.

Same—Fraud on Creditors.

To permit the withdrawal of the fund, virtually appropriated to the payment of this debt, and take it out of the state, would be aiding in the effort to defeat a creditor in the collection of his debt.

APPEAL FROM WASHINGTON CIRCUIT COURT.

October 6, 1868.

Opinion of the Court.

OPINION OF THE COURT BY JUDGE PETERS:

The order drawn on Hays, the treasurer of the turnpike road company, by appellee Mackin was evidence of an indebtedness to that amount by the drawer to the payee, and the parties all looked to the unpaid stock owing by the subscribers of stock to the road, for payment, as is manifest by the order itself, and the terms of acceptance by Hays the treasurer, and when Mackin recovered judgment against the defaulting stockholders, for the unpaid stock owing by them, having drawn the order on that fund, it was his duty to have assigned, and set apart to Miller so much of said judgment as was sufficient to pay him his debt.

To permit him to intervene, and withdraw the fund he had virtually appropriated to the payment of this debt, and to take it out of the state, would be aiding him in his effort to defeat a creditor in the collection of his debt.

The judgment sustaining the demurrer to the original and amended petitions is therefore *reversed*, and the cause remanded with directions to over-rule said demurrers, and for further proceedings consistent with this opinion.

Craddock, for appellant.

Hill, for appellee.

IVY MILLER v. E. C. COMBS ET AL.

Lien—Unpaid Purchase Money—Waiver.

Where one, claiming a purchase money lien on land, is present at a transfer of a deed thereto by the parties, to another purchaser, and does not make known or claim his lien, held to waive any right he may have had, to enforce his lien.

Same.

A fortiori, where a suit for the amount of the lien had been filed in the Quarterly Court, instead of the Circuit Court where he could have enforced his lien.

Opinion of the Court.

October 8, 1868.

OPINION OF THE COURT BY JUDGE PETERS:

The able argument of appellant's learned counsel has been read with pleasure, and we hope not without profit, but we cannot concur in his conclusions.

The title bond of Hendrick with the assignment is not filed; but it is not alleged that the assignment contained a statement that the purchase money from Combs to appellant, or any part of it remained unpaid.

Moreover the opportunity was not wanting to appellant to have secured a lien on the lot for his unpaid purchase money, for Hendrick proves that he hesitated, and refused to make the deed to Combs, or his wife, until he consulted appellant on the subject, and he directed him to make the deed either to Combs or his wife, until he consulted appellant on the subject, and he directed him to express in the deed that the purchase money was not paid, which instruction would doubtless have been obeyed, as Hendrick was not willing to make the deed to his assignee, or to his order until he first consulted Miller.

Another fact is worthy of notice. Appellant first sued Combs in the quarterly court, and why if he supposed he had a lien on the lot for his money, he did not bring his action in the circuit court to enforce his lien is not explained. This circumstance, with what he said to Hendrick, on the subject of making the deed, indicated a purpose to waive his lien; or an indifference about securing, and retaining it.

The judgment must be *affirmed*.

Little & McFarland, for appellant.

Bickers, for appellee.

Opinion of the Court.

T. L. MARTIN v. A. JAYNE & SON.

Consignment of Goods to be Sold on Commission—Responsibility for Loss by Fire..

Where the evidence conclusively shows, that goods, consigned to a merchant, were simply sent out to be sold on commission, he can be held responsible only for the portion disposed of, his store and contents being destroyed by fire.

APPEAL FROM OWEN CIRCUIT COURT.

December 10, 1868.

OPINION OF THE COURT BY JUDGE ROBERTSON:

The letters addressed by the appellees to Blanton and Toon after the destruction of the drugs by fire, sufficiently show that they had been consigned to the appellant to sell for the appellees on commission, and also that the drugs remaining unsold were transferred to Blanton and Toon to sell on commission with the consent of the appellees.

So far therefore as the drugs first consigned to the appellant were unsold he is not responsible. How much of them had been sold by the appellant does not appear. But their said letters show that the appellees considered the appellant indebted to them for drugs sold by him. That matter, however, was not so litigated as to authorize a judgment on it either way, but may, by amended pleadings and otherwise, be investigated on the return of the case to the circuit court for retrial.

The result of the foregoing view is that on the facts as now exhibited, the circuit court erred in refusing to give the instruction asked for by the appellant, construing that instruction, as we are inclined to do, to include the drugs sued for, but on another trial it might be prudently made more explicit.

Wherefore the judgment is reversed and the cause remanded for a new trial.

Scott, for appellant.

Major and Montgomery, for appellee.

Opinion of the Court.

HENRY KEEN v. HENRY DOORMAN AND LOUIS WIZE.

Discretion of Court to set Aside Judgment.

Acting under Sec. 800, Civ. C. the Chancellor, suspended a judgment rendered, within the prescribed time, held, that having thus retained the power, within a reasonable time thereafter, to set aside the verdict, he did not abuse a legal discretion in subsequently doing so.

APPEAL FROM JEFFERSON CIRCUIT COURT.

December 2, 1868.

OPINION OF THE COURT BY JUDGE PETERS:

Under *section 800 Civ. C.* the chancellor had the power to set aside, change, or modify the judgment rendered, at any time, within sixty days from its rendition. Within the prescribed time he suspended it, and thereby retained the power, within a reasonable time thereafter, to set it aside, or to enforce it, and it does not appear he abused a legal discretion in subsequently setting it aside.

There is some evidence that appellee was indebted to Doorman, when the latter abandoned the building, but from the evidence of payments adduced by him, and the amount of labor, and materials required to complete the work after it was abandoned, the testimony preponderates to the conclusion that the payments made before it was abandoned equaled the value of the labor and materials furnished by Doorman.

The different statements made by appellee in relation to the purchase of the horse and wagon were inconsistent, and the evidence of any purchase unsatisfactory, and inconclusive. The conclusions of the chancellor are sustained by the weight of the evidence. Wherefore, the judgment is *affirmed* on the original and cross appeals.

Harrison and Bennett, for appellant.

Demblitz, for appellee.

Opinion of the Court.

MURPHY & HAYDEN v. ENGLISH & MURPHY ET AL.

Judgment at Same Term Answer Filed, without Citation or Appearance.

It is error to render judgment against a defendant on a cross petition, during the same term it was filed, without citation or appearance, or a waiver of it not appearing in the record.

APPEAL FROM LINCOLN CIRCUIT COURT.

December 18, 1868.

OPINION OF THE COURT BY JUDGE ROBERTSON:

Whatever may have been the pretermitted proof on the answer and cross-petition of the Shankses, it was premature and erroneous to render judgment prejudicial to the appellant, during the same term it was filed without citation or appearance or a waiver of it not appearing on the record.

Wherefore, the judgment of the circuit court is reversed, and the cause remanded for further proceedings.

Bradley, for appellant.

Owsley, Burdett, for appellee.

BEN PERRY ET AL v. THOMAS L. MCKEE ET AL.

Judgment—Action on Bond—Assessment of Damages.

In an action, founded on bonds of defendants to perform the judgment exhibited and the amount sought to be recovered was specifically stated in accordance with the judgment, the defendants failing to answer, the court is authorized to render a judgment without a jury to assess damages.

APPEAL FROM OWEN CIRCUIT COURT.

December 9, 1868.

Opinion of the Court.

OPINION OF THE COURT BY JUDGE HARDIN :

Although the verdict of the jury in the suit of McKee, &c., vs. Frank Perry may have been irregular or erroneous in not conforming to the 360th section of the Civil Code, nevertheless the judgment was not void and could not be so regarded in this section.

Nor was the misjoinder of defendants, if in fact they were not properly joined as parties separately liable on the same contract, an available objection, upon the general demurrer in this case. (Civil Code, section 121).

As the action was founded on the bonds of the defendants to perform the judgment of the court and the judgment was exhibited and the amount sought to be recovered was specifically stated in accordance with the judgment, and the defendants failed to answer, the court was authorized, under section 409 of the Civil Code, to render judgment in the action without a jury to assess damages.

We perceive no available error in the judgment.

Wherefore, the judgment is affirmed.

WILLIAM H. TENNISON v. EDMOND POINTER..

Pleading—Cross Petition.

Where a cross petition and counter-claim depend on the facts stated in the answer to original petition, held that those facts showing imposture and entire want of title either legal or equitable, are admitted by the failure to respond to the allegations specifically, as required by the Code.

Scott, for appellants.

Lindsey, for appellees.

APPEAL FROM HART CIRCUIT COURT.

December 15, 1868.

OPINION OF THE COURT BY JUDGE ROBERTSON :

Opinion of the Court.

The appellant held the affirmative and the burden of proving his allegations, so far as denied, devolved on him.

The most material of the allegations show a total want of consideration and an ungenerous advantage taken of inexperience, ignorance and misplaced confidence.

The cross-petition and counter claim depend on the facts stated in answer to the original petition. And those facts, showing imposture and entire want of title, either legal or equitable, are admitted by the appellee's failure to respond to the allegations specifically, as required by the Code.

There being then no consideration for the compromise, it is not enforceable, and there is an implied obligation to refund the \$55 paid by the appellant.

Wherefore, the judgment is reversed and the cause remanded with instructions to dismiss the petition and render judgment on the cross-petition, as sought by it on the counter claim.

J. C. Rush, Barnett & Edwards, for appellant.

Dawson, H. C. Martin, for appellee.

SEYMOUR HOPPER v. JOHN W. HOLTZCLAU.**Bills and Notes—Assignment after Maturity.**

A purchaser of a note, assigned, after maturity, takes it subject to all the equities that it would have been subject to in the hands of the payee.

Exceptions to Depositions—Appeal and Error.

Where depositions used in a former adjudication of a case before the Appellate Court and not then excepted to, are properly admitted, on the return of the cause, as evidence in the second trial, the question of its competency being settled by the former adjudication.

APPEAL FROM LINCOLN CIRCUIT COURT.

December 18, 1868.

OPINION OF THE COURT BY JUDGE PETERS:

Opinion of the Court.

This is the third time this case has been to this court, and the two principal questions presented for consideration are, first, was the deposition of B. D. Lusk properly admitted as evidence for appellee.

After the reversal of the judgment upon the first appeal, and on the next trial thereafter in the court below that deposition was offered by appellee, it was excepted to as being incompetent, by appellant, his exceptions were over-ruled, and the deposition read, no exceptions were taken to this ruling of the court, but the verdict and judgment on that trial were unfavorable to appellant, he then brought the case to this court, and it was again reversed, because the court below refused to permit him to introduce Alexander Lusk as a witness for him. No objection was made then in this court to the admission of B. D. Lusk's deposition, and that was not adjudged by this court as erroneous. As therefore that evidence was in and the same not then adjudged erroneous the court below properly admitted it on the last trial, the question of the competency having been thus settled by the former adjudication. This principle has often been recognized by this court.

Second, did the court err in the instructions given for appellee? We think not. The note though negotiable was not assigned to appellant until after its maturity, and he then took it subject to all the equities that it would have been subject to in the hands of the payee.

Wherefore, the judgment must be *affirmed*.

Durham, Dunlap, for appellant.

Bell, Hill and Alcorn, for appellee.

Opinion of the Court.

MURPHY & McALISTER v. J. S. HUGHES' ADMR. ET AL.

Bills and Notes—Assignment without Recourse.

A note, taken up by a volunteer, though assigned to him without recourse, is held to be discharged, as against the obligor, in a suit to enforce its collection.

Bills and Notes—Consideration.

Payment by appellants, of a note of another, against whom suit had been threatened, where he had promised to renew with appellants, as sureties, held to be a binding consideration, in suit to recover from the payee.

APPEAL FROM LINCOLN CIRCUIT COURT.

December 19, 1868.

OPINION OF THE COURT BY JUDGE ROBERTSON:

The testimony authorized these deductions: 1, that Hughes' administrator and the administrator of Wallace were anxious to have the note now sued on paid or sued on without delay. Second, that John S. Hughes, as principal obligor, to avoid a suit, promised to pay the note by the substitution of his own note with the appellants as his sureties. Third, that the appellants, acquainted with that arrangement, and informed by Wallace's administrator that unless the promised substitution should, *at once*, be made, suit would be brought on the note without any further delay, executed their own negotiable note, in the absence of J. S. Hughes, *for effectuating his arrangement and preventing the threatened suit and saving the credit of their partner*. Fourth, that the note was thus paid, and assigned (without recourse) to them, merely as evidence against J. S. Hughes that they had paid it for him. And these authorized deductions show a binding consideration, and sustain the verdict to the effect that the noted sued on had been thus discharged.

And, therefore, there being no error in instructions, the judgment is affirmed.

Dunlap, for appellant.

Hill & Alcorn, for appellee.

Opinion of the Court.

W. H. LONG ET AL. v. COMMONWEALTH FOR USE OF McGOODWIN ET AL.

Sureties on Bond—Liability for Default of Sheriff—Estate.

Where a settlement is made by a sheriff with the court commissioner, showing a balance due, in a suit against his sureties, and the administrator of his estate, they are held jointly liable.

APPEAL FROM LYON CIRCUIT COURT. i

December 22, 1868.

OPINION OF THE COURT BY JUDGE HARDIN :

As it does not appear that any other claims existed against the county of Lyon than those of the appellees, for the erection of public buildings, it seems to us that the order of the county court made at its October term, 1863, was sufficiently specific and certain to require the sheriff to pay on the claims in controversy, the funds remaining in his hands collected as county levy for the years 1862 and 1863. His settlements with the commissioner of the court showed that a balance of the levy for 1862 remained in his hands of \$620.22 and that a balance of \$1,212.03 remained in his hands of the levy of 1863, and although the sureties in the bond executed on the 27th of April, 1863, were not liable for said balance of \$620.22 the estate of Young, the sheriff, was, and the bond embraced the levy for 1863. From these views it results that the court properly adjudged that the plaintiff recover against the estate of Young alone the balance of funds remaining of the levy for 1862, and for the residue of the claims rendered judgment against the sureties as well as the administrators of Young.

Wherefore, the judgment is affirmed.

Marble, James, for appellant.

Opinion of the Court.

L. L. NOEL v. CALEB ARNOLD'S EXOR.

Commissioners Sale—Presumptive as to Advertisement.

In the absence of proof to the contrary, it will be presumed that the commissioner advertised the sale as directed by the judgment, especially when his report shows he did.

Pleadings—Defective Petition Cured by Subsequent Pleadings and Exhibits.

The facts set out in the defendants answer and cross-petition together with the title bond filed therewith, clearly shows that there was a vendor's lien as to all the notes. Held that the defect in the original petition was thereby cured, at least after judgment.

APPEAL FROM OWEN CIRCUIT COURT.

January 8, 1868.

OPINION OF THE COURT BY JUDGE WILLIAMS:

Whatever may have been the defect of the original petition as a suit to enforce a vendor's lien it was good as a suit to recover the amount of the notes due and unpaid.

The answer and cross-petition set out that the consideration for these notes was the sale and purchase of land and exhibited the vendor's title bond, which describes the notes sued on, and some not due at the bringing of the original suit, and which bond shows *that the title was to be made when the entire purchase price was paid*. This cross-petition sought a perfect title or a rescission of the contract. Plaintiff subsequently filed amended petition, making the vendor's and testator's heirs at law parties and showing a perfect title. The cause was transferred to the equity docket on defendant's motion. The amended petition averred that the notes last due were for unpaid purchase price for land and that a lien existed therefor, but, by oversight no such averment was made as to the notes originally sued on, yet, the facts set out in the defendant's answer, and cross-petition together with the title bond exhibited by him clearly show that there was a vendor's lien as to all the notes, and no waiver of said lien is averred or shown, therefore, we think the defect in the original petition was cured by the subsequent pleadings, at least after judgment, it will

Opinion of the Court.

not be heard the first time, as an obligation to enforcing the lien, especially as the plaintiff in his amended petition sets out said notes and when they will be due and asks judgment thereon and which appellant in his response thereto concedes as to the description, but objects to judgment not because the notes were not due, but because he was seeking a rescission of the contract, and as the litigation continued for several years after the notes were all due and as we approve of the refusal to rescind, we will not reverse upon this mere technical ground under these issues. As a perfect title was manifested and no error shown in the allowing of credits, no substantial error, to appellant's prejudice, is perceived as to the judgment. The direction to the commissioner as to advertising and selling was certain to a common intent and in the absence of proof we will presume he advertised in the vicinity of the land, especially as he reports a compliance with the judgment, which required notice to be placed at the court house door and three other public places in the county. Judgment affirmed.

Landram, for appellant.

Craddock, for appellee.

D. B. DUNLEVY & Co. v. J. B. O'BANNON & SON.

Pleading—Petition on Merchants Account—Price of Goods—Agreement.

The allegations, in a petition on a merchants account, that the debtor is indebted to him in the sum of fifty-five dollars for goods and merchandise sold and delivered by the plaintiff to the defendant, the particulars of which are set out in an account filed therewith imparts prima facie, that the price had also been agreed upon or that they were reasonably worth it, and must be deemed setting out a cause of action.

Same—Averments in Answer Denied by Law.

The answer averred that the tea was not of the quality authorized to be purchased by them and that they had offered to return it. Held, that this averment stands denied by law, nor is this deficit supplied by the offer in the answer to return it.

Opinion of the Court.

January 13, 1869.

OPINION OF THE COURT BY JUDGE WILLIAMS:

The allegation that the appellees were indebted to appellants in the sum of three hundred and fifty-five dollars and fifty-two cents for goods and merchandise sold and delivered by the plaintiffs to the defendants the particulars of which are set out in an account filed herewith, impart *prima facie* that the price had also been agreed as charged or that they were reasonably worth it and must be deemed as setting out a cause of action, especially when the defendants instead of demurring answered and made an issue which was found against them.

The answer averred that the tea, which was sent by appellants to appellees at the instance of the agents of the latter, was not of the quality authorized to be purchased by them and that they had notified appellants thereof and offered to return the tea to them, but this averment stands denied by law and there was no proof of such notification or offer, nor is this deficit supplied by the offer in the answer again to return it. The verdict in appellant's favor on the first trial was right and the pleadings and proof, and no valid cause for a new trial being shown it was erroneous to set aside the judgment and verdict and grant a new trial.

A portion of Reinhart's deposition was suppressed on exceptions by appellees, before the trial but if any portion which had been suppressed were afterwards permitted to go to the jury the record shows no objection by appellees or exception thereto and after it had been permitted to go to the jury without objection and had been considered by them it was too late to ask a new trial by reason thereof.

As the court erred in setting aside the first judgment and verdict we need not examine the other alleged errors.

Wherefore, the last judgment is reversed with instructions to the court to set aside the order granting a new trial on the first judgment and transference.

Brown, for appellants.

Hays, for appellees.

Opinion of the Court.

LUCY W. WATSON *v.* JAMES W. FERGUSON.

Principal and Agent—Attachment of Funds in hands of Agent—Right to Retain Fund for Indemnity—Injunction.

An agent has an equitable right to retain the funds of his principal for indemnity and to enjoin any appropriation of it by the attaching creditors.

APPEAL FROM BOURBON CIRCUIT COURT.

January 9, 1869.

OPINION OF THE COURT BY JUDGE HARDIN :

When the appellant, as creditor of Oscar H. Burbridge, attached his funds in the appellee's hands as his agent, the latter, in danger of irreparable loss as his surety, had an equitable right to retain the fund for indemnity and to enjoin any appropriation of it by Burbridge's creditors without such indemnity. The appellant's attachment was therefore subject to that pre-existing equity, and the circuit court did not err in discharging the attachment on that ground.

Wherefore, the judgment is affirmed.

Prall, for appellant.

Davis, for appellee.

J. H. COMPTON *v.* W. O. NEWMAN AND OTHERS.

Officers—Sheriffs—Constable—Responsibility.

Sections 4 and 5 of Art. 4 Chap. 20, 1 Revised Statutes page 257, fixing the responsibility of constable, has no application to sheriffs.

APPEAL FROM METCALFE CIRCUIT COURT.

December 11, 1868.

Opinion of the Court.

OPINION OF THE COURT BY JUDGE PETERS:

The petition contains no allegation that the persons on whom the fee bills, for which the sheriff gave his receipt, were solvent, and able to pay them, but it is alleged that he collected them, and failed to pay the amount over.

And it appears incidentally in the bill of exceptions that the sheriff had died before the institution of the suit, but when or how long before is not known.

It was necessary under the issue formed by the pleadings to prove the collection of the money by the sheriff in order to entitle appellant to a judgment, which proof he failed to make and this was made the more necessary as the sheriff was dead and his securities could not be presumed to know anything in relation to the transaction.

No such enactment appears to have been made applicable to sheriffs as sections 4 to 5 of article 4, chapter 20, 1 R. S. p. 257, fixing the responsibility of constables.

As therefore there was no evidence authorizing a judgment against appellees, the judgment rendered must be affirmed.

Garnett & Dehoney, for appellant.

James Harlan, Jr., for appellees.

SARAH FELAND ET AL V. WILLIAM BRAXDALE.**Adverse Possession—Notice—Registration of Deed—Limitation.**

Where lapse of time and the Statute of Limitations are relied on as a bar to an action to recover possession of land the plaintiff will be presumed to have notice of the adverse holding from the time of the registration of the deed.

APPEAL FROM LINCOLN CIRCUIT COURT.

January 5, 1869.

OPINION OF THE COURT BY JUDGE PETERS:

Opinion of the Court.

In the answer lapse of time and the statute of limitation is relied upon as a bar to the action, and the deed of Robert Feland to Caldwell is filed by him as evidence of title bearing date January 6, 1849, and covers the land in contest that deed was made for a valuable consideration, contains covenant of warranty, and Braxdale alleges he and those under whom he claims, have been holding said land under said deed since its execution as their own, and were looking to no one for a title, and that deed was made more than 17 years before the commencement of this action. Such holding was adverse (*Farrow's Heirs vs. Edmonson*, 4 B. M. 605) and from the registration of the deed, appellants will be presumed to have had notice of such holding which was adverse. And as appellants had all arrived at age more than three years before the commencement of this action the bar was complete.

Wherefore, the judgment in favor of Braxdale is affirmed.

Dunlap, VanWinkle, Hill, for appellants.

James, Durham, for appellee.

GEORGE W. SUTHERLAND v. SAMUEL ULLMAN ET AL.

Executions—Nulla Bona—Prior Liens—Equity Jurisdiction—Creditors.

A return of nulla bona by reason of an assertion of a prior lien, gives to a court of equity jurisdiction to clear the title, it not being material to the judgment debtor, whether the lien claimed was right or not.

Same.

Creditors alone are concerned in the distribution of the proceeds of a sale under execution.

APPEAL FROM MERCER CIRCUIT COURT.

January 30, 1869.

OPINION OF THE COURT BY JUDGE ROBERTSON:

The return of *nulla bona* and that of not sold for want of bidders, for the land afterwards levied on, resulting from the embarrassment of the legal title by a lien asserted on it, gave to the

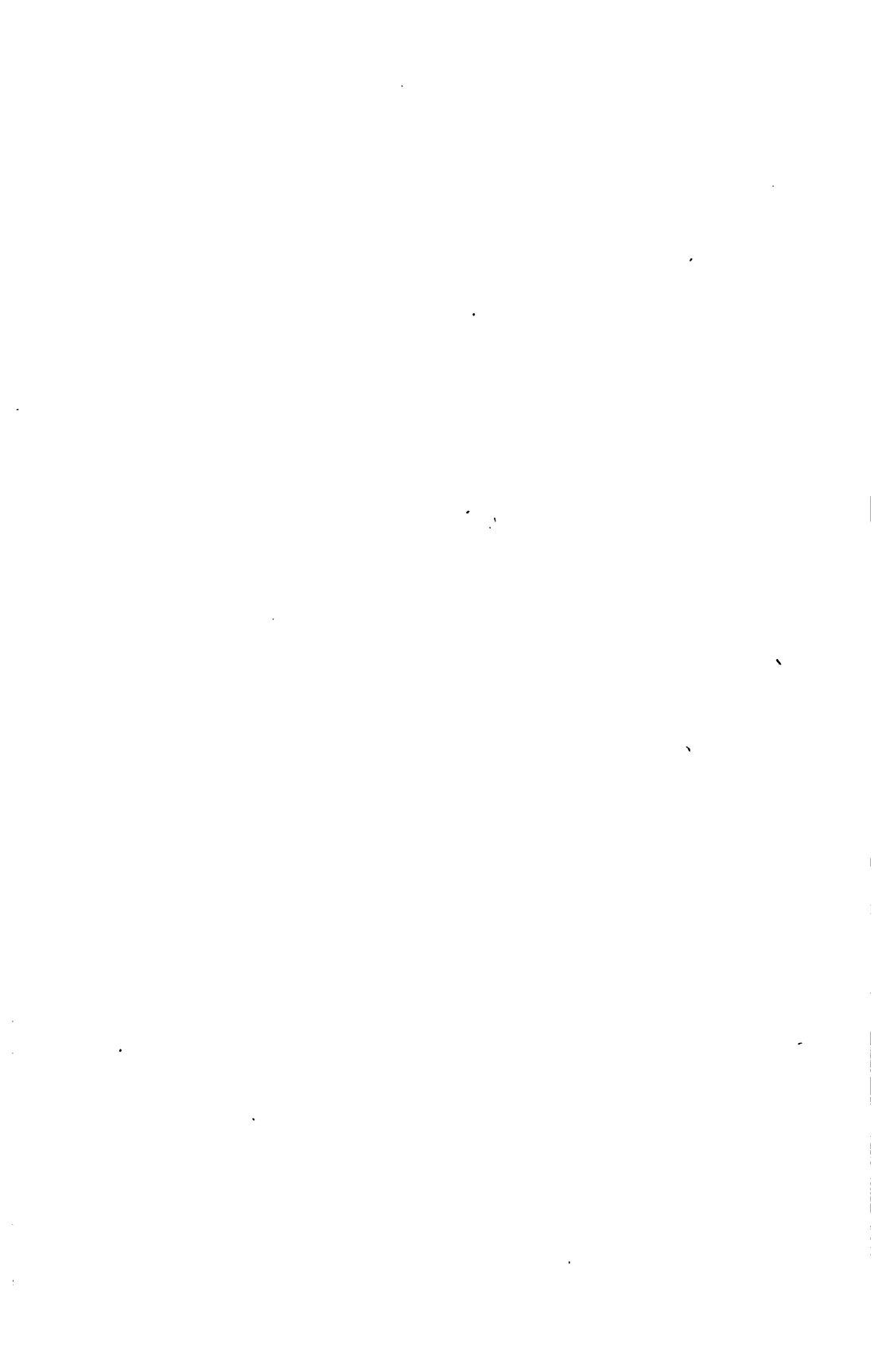
Opinion of the Court.

court of equity ancillary jurisdiction to clear the title and subject the land to sale for a fair price in satisfaction of the judgments; and it was not material to the appellant whether the creditor claiming the lien had an available right to it or not. The question of priority in the distribution of the proceeds concerned the creditors alone, and all of them seem satisfied.

Wherefore, the judgment is affirmed.

Harrison, for appellant.

Polk, for appellees.



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The answer was not sufficient to escape a judgment for costs, but was an sion of a lot belonging to the plaintiffs," is not a denial that she was in possession in fact, but only that her possession is unlawful, nor construed as a plain and simple denial of the title alleged in the petition. Nor does a denial "that she keeps plaintiff out of his rightful property" deny that she held the ground nor that it was the property of the co-plaintiff.

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- The answer was not sufficient to escape a judgment for costs, but was an admission of title in the plaintiffs, and of her own possession. 212
- Pleading—Answer, Sufficient as a Counter-Claim.**
 An answer, though deficient in not stating the terms of a contract, whether written or oral, where it substantially alleges fraudulent misrepresentation and specified damages resulting therefrom, will be good as a counter-claim. 312
 An answer, though not good as a bar to an action, may be sufficient as a counter-claim,—vol. 1, 38.
- Pleadings—Offset—Counter Claim—Issue in Bar.**
 The answer of the defendant was not an offset or counter-claim, but presented an issue in bar, which by the provisions of the Civil Code, stood denied except as conferred by the statements of the petition. 124
- Pleading—Variance Between Allegations and Written Contract.**
 An answer, alleging that by an oral stipulation (inconsistent with the written memorial of the contract sued on), the sale was to be void if the owners of a remainder should refuse to relinquish their interest, without proof of fraud or mistake in the written contract, is inadmissible...596
- Demurrer—Allegations in an Answer.**
 The allegations in an answer, forming both the conclusions of the law and the facts in the case are demurrable. 365
- Demurrer—Pleadings—Allegations in Answer as True.**
 A demurrer to an answer to a petition that alleges the acceptance by plaintiff of new notes with security, in settlement of those sued on, and which were secured by a mortgage, should be over-ruled as it is an admission of the facts as alleged in the answer. 476
- Pleadings—When Answer of One Defendant Not the Answer of All.**
 The joint answer of all defendants to an action, sufficient as a plea of duress on the part of one of said defendants, does not present that defense as a bar to the action as against the other defendants who seek to avoid an obligation on the ground of a false representation of plaintiff in the procurement of their signature to a note. 67
- Pleadings—Appearance.**
 An answer signed by one of the devisees of a trust fund, reciting that all three devisees were respondents, is not an appearance for all. 345
- Pleadings—Necessary Parties Alleged to Have Been Omitted.**
 In an answer to a foreclosure suit, in which, as a defense, it is alleged that other parties are interested, and should be joined as defendants, to be a good defense it must also show the facts, and how that interest occurs to enable the court to determine the question. 556
- Pleading—When Not Required to Be Denied Under Oath—Written Instruments Filed.**
 When in an answer a receipt is referred to as having been duly signed by the plaintiff, it must be filed with the pleadings in order to require the plaintiff to a denial of same under oath. The averment in the answer that it was executed, is not sufficient. 604
 Facts not alleged in the answer, that are in the pleadings, need not be denied,—vol. 1, 389.
- Pleading—Set-offs.**
 An answer setting up a set-off for "services rendered, cash advanced, loaned, etc.," cannot be held good for an item in the account "for board of negro boys." The "etc." cannot be regarded as an allegation to anything 597
- Pleading—Sufficiency.**
 An answer, purporting to be a counter-claim and set-off which fails to

ANSWER—Continued.

specifically deny the allegations of the bill, held, not to be sufficient to avoid a judgment theretofore rendered by default. 542

Same.

It is not error to refuse the filing of an answer to a petition, at the succeeding term of the court, at which judgment by default had been rendered. 542

When allegations in answer sufficient to put plaintiff on his proof as to statements in petition,—vol. 1, 94.

An answer that neither alleges delivery, nor legal excuse for the failure, is not a bar to the action,—vol. 1, 635.

When an answer is tendered, after being lodged for record, omission to note the filing, regarded as waived,—vol. 1, 203.

Slight variation in answer not taken as traversing the distinctive allegations of petition,—vol. 1, 635.

Burden of proving allegations in an answer of a partial defense as to excessive interest, devolves on defendant,—vol. 1, 193.

Error in submitting case before process served or confession taken, does not prevent filing answer any time before case stood for trial,—vol. 1, 230.

ANTENUPTIAL CONTRACT.

The written consent of the husband to the use of the wife's property, made at the date of marriage, and attached to and recorded with the wife's will, held to be an ante-nuptial contract. 466

Agreement by husband that wife shall have full control of her personality, vests her with full title after marriage, and at her death go to her personal representative,—vol. 1, 500.

Same—As to agreement that estates should be kept separate,—vol. 1, 359.

Will not relieve husband of duty to furnish medical attention and pay burial expenses of wife,—vol. 1, 59.

APPEAL AND ERROR.

Appearance in Appellate Court—Waiver of Errors.

The appearance before the appellate court by brief, of an administrator, and as to whom no appeal had been taken nor bond executed, will cure any defects in errors or irregularities, against which he cannot complain....549

Pleading—Duties of Circuit Clerk in Making Transcript of Record.

It is the duty of an appellant, in order to get a review by the appellate court, to file exceptions to the ruling of the court below in refusing to permit the filing of an amended answer, and then present and file a bill of exceptions making the rejected amended answer a part thereof, and incorporating them in the record. It is no part of the official duty of the clerk to state that the rejected pleadings are the same that he copies, and the appellate court cannot upon that unofficial statement so treat them. ...51

Amended Answer—Not Permitted to Be Filed—Bill of Exception.

Where the lower court erred in not permitting the amended pleading to be filed, the error is not available in the appellate court, as it was not made part of the record by a bill of exceptions or order of the court identifying it. 222

Defective Pleadings in Court Below.

However defective a petition may be, after issue joined in the court below, no demurrer having been filed to correct the errors of pleading, it is too late to object for the first time in the appellate court, to the defects, especially as no motion was made for a new trial. 271

Commissioner's Report—Judgment of Court.

Where a commissioner finds against a defendant, contrary to the rules given by the trial judge in referring matters to the commissioner for an equilization among heirs, such part of the commissioner's report, as is violative of the judgment of the presiding judge, will be set aside by the appellate court, on the face of the pleadings. 39

APPEAL AND ERROR—Continued.

Appeals—Cross Appeals.

A party has no right to a cross-appeal where there has been no appeal from the judgment in his favor. 193

Bill of Exceptions—Time to File.

A bill of exception filed at a subsequent term of the court with an order extending the time, will not be considered by the Court of Appeals. 181

Bill of Exceptions, Filed at Special Term, Without Objection.

Objections not made to the filing of a bill of exceptions at a special term of the lower court, cannot be made for the first time in the Court of Appeals. 223

Failure to except to sustaining of exceptions to evidence by lower court, not subject to revision by Appellate Court,—vol. 1, 134.

Where no exceptions found in record, considered as waived, on appeal,—vol. 1, 75.

Same—As to illegal order suspending license to sell spirituous liquors,—vol. 1, 372.

Same—As to evidence introduced on the trial and not objected to,—vol. 1, 172.

A defendant, advised of material evidence to him, who makes no effort to produce same, is guilty of gross laches, and it will not avail him for reversal on appeal,—vol. 1, 190.

Exceptions.

Where the record does not show exceptions to the giving or refusing of instructions below, the Appellate Court cannot revise it. 62

Errors by Trial Court.

Errors by the trial court cannot be available in the Appellate Court, unless excepted to as allowed by section 275, Criminal Code. 209

Minor—Failure to Appoint Guardian.

It is reversible error to render a judgment against a minor without having a guardian appointed to defend for him. 284

Criminal Code—New Trial—Refusal to Grant.

Under section 349, Criminal Code, it is provided that an error in granting or refusing a new trial shall not be cause for reversal. Under these provisions it is obvious that the sufficiency of the evidence to sustain a charge in an indictment, cannot be enquired into by the Appellate Court, nor the judgment reversed on that ground. 251

Jurisdiction—Dissolving of an Injunction Without Final Judgment.

The Court of Appeals' jurisdiction extends only to the final order and judgments of inferior courts and cannot assume jurisdiction of an order dissolving an injunction without a final judgment in the action. 170

Appeal from quarterly court, and voluntary discontinuance,—vol. 1, 218.

Errors in instructions, not considered, when bill of exceptions fails to show all are contained therein,—vol. 1, 316.

Clerical Misprision.

A judgment will not be reversed for a clerical misprision, until the objection has been presented and acted on by the court rendering the judgment. 217

Appeals—Limitations—Judgment Presumed to Be Rendered on Last Day of Term—Extension of Term.

It may be presumed that a judgment was rendered on the last day of the term, where there is nothing to the contrary. The burden is on the appellant to show that the term fixed by law was extended. 153

Record Incomplete.

Where the record of a former suit between the same litigants is not copied in the record to the Appellate Court, it cannot avoid as grounds for an objection insisted on for the appellant that the cause of action was barred by a previous judgment. 56

Appeal by One of the Parties—Effect of Reversal of Judgment.

Although only one of a number of parties against whom a judgment has

APPEAL AND ERROR—Continued.

- been rendered, appeal, the case will be reversed in its entirety if the controversy cannot be rightfully adjusted without it. 49
- Final Order—Filing Away—Motion to Reinstate.**
 An order directing that a case be filed is not final and an order of the court over-ruling a motion to reinstate the case on the docket is not a judgment dismissing the action from which an appeal may be prosecuted.28
- Action of Trespass—Judgment—Damages Assessed by Jury.**
 Such a judgment can only be corrected on appeal from the justice court to the proper tribunal, and not by objection in the Court of Appeals, that judgment was void. 569
 A decree of the chancellor, leaving a judgment open to a contingency, is not such a final judgment as will give the Appellate Court jurisdiction,—vol. 1, 617.
- Injunction—Reversal of Judgment—Effect.**
 The judgment of the court of appeals reversing a judgment perpetuating an injunction and remanding the case for only an assessment, etc., had the legal effect to dissolve the injunction. 93
- Nonresident—Judgment—Affirmance.**
 A judgment against a non-resident, constructively summoned, can not be affirmed unless by appeal. 33
- New Trial—Requirements in Motion for.**
 The provisions in Sec. 372 Civ. Code, as to applications for a new trial by motion, etc., requires, all errors, which the party complaining, deems to have been committed prejudicial to him in the progress of the trial, must be presented in writing as grounds for a new trial, in order to direct the attention of the Appellate Court to the alleged errors, for correction. The mere objection to the introduction of testimony during the trial, is not sufficient. 451
 In a prosecution for misdemeanor, record must be lodged in clerks office of Appellate Court 60 days after judgment,—vol. 1, 445.
- Motion to Dismiss Appeal—Waiver.**
 Pending action on a motion to dismiss an appeal, the filing of a brief by appellee on the merits of the case does not constitute a waiver of the motion; the filing of the brief and motion to dismiss were simultaneous and intended to operate alternately. 63
- Continuance of Cause.**
 The question of whether in a joint suit against executors, and the same parties as individuals, the court below should dismiss the cause as against them as executors, cannot be raised in the Appellate Court on appeal by them in their individual capacity, no judgment having been rendered against them as executors below. 572
- Marshal's Bond—Mistake in Execution—Default Judgment.**
 On appeal from a judgment by default as to the validity of a marshal's bond reciting that "David Webb as Marshal" and others as "sureties do hereby covenant that the said, etc.," an objection as to this informality is not available for the first time in the Appellate Court. ...588
- Depositions—Exceptions to—Waiver.**
 After exceptions to depositions have sustained, the depositions withdrawn, and then by agreement of the parties, the plaintiff is permitted to read the depositions upon the trial of the cause, the objections are thereby waived, and cannot be available for reversal in the Court of Appeals. 571
 Where issue has been joined and a trial had, irregularity of the pleadings will not avail on appeal,—vol. 1, 395.
 Same—As to ruling of the court in rejecting depositions of a witness, though erroneous,—vol. 1, 42.

APPEARANCE.

Appeal and Error in Appellate Court—Waiver of Errors.

The appearance before the Appellate Court by brief, of an administrator, and as to whom no appeal had been taken nor bond executed, will cure any defects in errors or irregularities, against which he cannot complain. 549

Exceptions to Commissioner's Report Regarded as Sufficient—Service.

The filing of exceptions to a master commissioner's report, by an administrator, who had not been served with process to the suit is held to be a sufficient appearance. 306

Attachment—Non-residents—Want of Authority to Enter Appearance by Attorney—How Made Known.

It will not be judicially presumed that an attorney had no authority to enter an appearance for a defendant, but if he should do so without such an authority the whole judgment would be void; this can only be shown by a direct proceeding for that purpose. 161

The appearance of a minor, defendant, cannot be entered by attorney,—vol. 1, 520.

Summons—Constructive Service—Failure to Execute Bond—Appearance in Court of Appeals Cures Defect.

The appearance of a defendant in the Court of Appeals cures a defect of the failure to execute bond in the court below by an appellant in a suit on a note. 261

A bail bond stipulating for the appearance of defendant at any other than the next term after its execution, void,—vol. 1, 451.

Judgment at Same Term Answer Filed, without Citation or Appearance.

It is error to render judgment against a defendant on a cross petition, during the same term it was filed, without citation or appearance, or a waiver of it not appearing in the record. 663

Pleadings—Answer.

An answer signed by one of the devisees of a trust fund, reciting that all three devisees were respondents, is not an appearance for all. 345

Notice of Meeting of Processioner.

The appearance and entering of objections to some of the acts of the processioners, is held to waive formal notice of the time and place of their meeting. 269

By an appeal from a judgment rendered on constructive service of process, appearance is entered,—vol. 1, 128.

APPRAISAL.

Exemption—Widow without Children—Failure to Demand—Administrators Duty.

A widow, who has no children left by her deceased husband, is entitled to her exemption, and the fact that she failed to demand said exemption when the appraisal was made, did not release the administrator from his responsibility incurred by taking and selling the property, it being his duty to cause the exempt articles to be set apart to her. 461

ARBITRATION AND AWARD.

Evidence—Arbitrators Award Competent Testimony.

In a suit between two claimants for land, where the vendor, under whom plaintiffs claim, accepted a deed to and asserted title to the land, recognizing the boundary as fixed by arbitrators, such an award is held to be competent evidence to establish title. 578

Attorney and Client—Right of Counsel to Submit Cause for Adjudication.

Although an attorney is not empowered by his general authority, as such to bind his client in a submission of his cause to arbitration, yet if he does so under special authority or where in doing so his action is ratified and adopted by his clients, the award, if otherwise valid, may be enforced. 118

ARBITRATION AND AWARD—Continued.

Affirmance or Decision by Circuit Court.

An award made by arbitrators, not named by the court but to be chosen by the parties litigant, is valid and binding, where the record shows who were chosen arbitrators, that they were all sworn, that the award was made and signed by one of them and the umpire, and that copies were furnished to each party, and where the parties, with their witnesses and counsel appeared before the board on the day set for the hearing, and all fully heard. 247

An appeal from the award of arbitrators is an acceptance of notice of the arbitration,—vol. 1, 184.

Informality in the oath administered to arbitrators not sufficient to set aside award,—vol. 1, 349.

ASSIGNMENT.

Promissory Note—Diligence—Insolvency.

The failure to issue an execution for ten days after it might have been done, is such want of diligence as will exonerate the assignor; and the proof of insolvency, when the execution was delivered to the sheriff, cannot dispense with diligence in issuing it. 302

Assignment of claims in hands of attorney for collection,—vol. 1, 214.

Title Bond—Warranty of Title.

An assignment of a bond for a conveyance of land does not import a warranty of the title. 222

Right to recover damages for loss of goods by carrier may be assigned,—vol. 1, 133.

Promissory Notes—Notice—Set Off.

Where a promissory note has been assigned without the knowledge of the payee, he is entitled to a set off against the same to the amount he had paid the assignor before he knew of the assignment. 121

Notes—Credits—Attitude of Assign.

Where two notes are due, one only of which has been assigned, the court will apply credits to the unassigned note, but not so when the unassigned note is not due. 300

Assignment without recourse presumed to warrant that it is a legal binding obligation on the obligor, but not required to refund consideration should obligor prove insolvent,—vol. 1, 279.

Lands and Conveyances—Original Survey—Fraudulent Conveyance.

An assignment of an original survey to a large tract of land, on a copy of the original, was made and afterwards the lands were patented to the assignor. The assignment was without consideration and at a time when the assignor was seeking to absolve himself of a large obligation on a bond of a defaulting sheriff. Held, to be a fraudulent transfer of title, though the assignee acquired possession of the lands after the death of the assignor. 342

ASSIGNMENT FOR BENEFIT OF CREDITORS.

A sale to operate as an assignment, must be to prefer a creditor and the vendor was insolvent,—vol. 1, 392-329.

An assignment need not be written in any technical form nor particular phraseology,—vol. 1, 533.

Surrender of land to sheriff for sale, on return of execution, nulla bona, not an assignment,—vol. 1, 611.

Transfer of purchase money notes for sale of land in contemplation of insolvency, and to prefer a creditor, is an assignment,—vol. 1, 546.

Proof of Insolvency of Debtor—Estoppel.

In the absence of proof of the insolvency of a debtor, but that the evidence conduces to show that all personal property, assigned for the benefit of creditor, was ample to liquidate all claims, the creditors will be estopped from further action to set aside conveyances of real estate as fraudulent. 541

ASSIGNMENT FOR BENEFIT OF CREDITORS—Continued.

Assignment—Benefit of Creditor—Wife's Dower.

The wife is entitled to dower in the real estate of her husband assigned for the benefit of creditors. 101

Laches—Trustee.

Where one assigns all chattels, choses in actions, etc., for the benefit of his creditors, and the trustee appointed, fails to act, and the assignor permitted to control, consume or squander the assets, the creditors are held to be guilty of laches. 541

Deed of Trust.

The deed of trust made by defendant to one Baird, as trustee, for the use of his creditors, vested them with rights which did not depend on the trustee executing bond and taking the oath prescribed by law. 116

Duty and Liability of Trustee.

Where a trustee prevents the consummation of a judicial sale of trust property by asserting an unfounded claim against it, and the property is therefore resold, he will be held responsible to the creditors for the difference in the price which it brought at the last sale and the amount bid at the first sale. 398

A trustee has no right to purchase trust property at a judicial sale and pay for same out of trust funds, unless authorized by the creditors..Ib.

ATTACHMENT.

An attachment without the prescribed affidavit will be discharged,—vol. 1, 466.

Cannot be sustained, where creditor had actual notice of assignment before his suit,—vol. 1, 533.

Non-residents—Want of Authority to Enter Appearance by Attorney—How Made Known.

It will not be judicially presumed that an attorney had no authority to enter an appearance for a defendant, but if he should do so without such an authority the whole judgment would be void; this can only be shown by a direct proceeding for that purpose. 161

Bond must be executed, for restoration of the property, before an attachment can be issued,—vol. 1, 299.

A party in contempt, should be summoned on a rule to appear before an attachment is issued,—vol. 1, 8.

Fraudulent Conveyance—Preferred Creditors.

Where the evidence conduces to prove the fraudulent transfer of property for the purpose of preferring creditors, and the willful appropriation of the assets of a defendant to his own personal use, at a time when he was fully aware of his insolvency, it will justify an attachment by the creditors and the decree of the chancellor setting aside such fraudulent transfers of property by defendant, will not be disturbed. 208

Grounds for—Bill of Sale—Fraudulent Intent to Prefer Creditors.

M. Onanpelt, having agreed to mortgage certain property to Hodge, his creditor, as collateral security, shortly thereafter, by bill of sale, transferred all his property to one Kugler, but possession not actually having been delivered. All done in seeming contemplation of his removal from the state. Held, to be sufficient to sustain attachment by the creditor, Hodge. 239

Grounds of attachment set forth in verified petition do not have to be stated and verified in a separate affidavit,—vol. 1, 576.

Departure from the state and concealment of himself to avoid summons sufficient grounds for attachment,—vol. 1, 576-299.

The concealment involves the intention of the debtor,—vol. 1, 576.

Deed lodged for record before attachment issued, and not assailed as fraudulent or voluntary,—vol. 1, 444.

Successful Claimant—Costs.

In an attachment suit, where a claimant is successful in sustaining his

ATTACHMENT—Continued.

- claim to part of the property, it is error to adjudge the costs of the suit against him, though the attachment be sustained in all other particulars. 238
- Estoppel—Parties to Suit—Sales Under.**
Parties to an attachment suit, where personal property is sold thereunder, are estopped from setting up an adverse title inconsistent with said adjudication which is binding upon them until reversed. 372
- Creditors Right to Proceeds of Insurance Policy.**
A creditor, as vendor of the insured property of one of whom the policy had been assigned, has a right to attach the liability of the Insurance Company to the assignee. 545
Wife entitled to exempt property of husband, in attachment proceedings,—vol. 1, 299.
- Lien—Return by Clerk to Wrong Court.**
Lewis & Co., having their execution returned, no property found, filed their petition in equity and by attachment, enjoined the payment to their debtor of moneys due by Hancock & Co. The clerk made the return to the March called special term of court, instead of the regular June term. This process was returned executed by the sheriff April 25, and subsequently the debtor was proceeded against as a non-resident; **Held**, that a lien was created by the attachment, prior to other creditors, whose liens were filed subsequent to the filing by Lewis & Co. 583
An attachment by a creditor of the distributee, before allotment, would have a prior lien,—vol. 1, 474.
On a lien for rent, produce of farm or other personal property liable,—vol. 1, 466.
- Improper Levy no Defense to Action.**
An improper levy by the sheriff on realty owned by a defendant instead of on his personal property, is no defense to an attachment suit. The remedy of the party aggrieved is against the sheriff for making an improper levy. 252
- Levy—Priority of Liens.**
When the sheriff levies attachments, first coming to his hands, on a reasonable amount of property, the levy of subsequent attachments on other property will give those a prior lien over the first attachments. ..161
- Necessary Affidavit.**
It is error to sustain an attachment levied on a non-resident's real estate in the absence of an affidavit to the effect that the defendant has no personal property in this State or not enough thereof to satisfy plaintiff's claim. 112
- Answer—Petition—Pleading.**
After issue made and trial begun upon the merits of a case, it is too late for an objection to the petition or attachment for want of verification. 183
Any one claiming attached property, may by petition be made a party,—vol. 1, 164.
But not so where case has been dismissed,—vol. 1, 164.
Surety on attachment bond not liable where attachment was against a firm on the firm's debt, though dismissed as to one member. Creditors can look to the partnership firm, or to each member for their debt.—vol. 1, 195.
A debtor in an attachment suit on an assigned debt, is entitled to a set-off for a claim due him by the assignee,—vol. 1, 611.

ATTORNEY AND CLIENT.

An administrator not entitled to employ counsel at the expense of the estate, to set up his personal claim,—vol. 1, 59.

ATTORNEY AND CLIENT—Continued.

Arbitration and Award—Right of Counsel to Submit Cause for Adjudication.

Although an attorney is not empowered by his general authority, as such to bind his client in a submission of his cause to arbitration, yet if he does so under special authority or where in doing so his action is ratified and adopted by his clients, the award, if otherwise valid, may be enforced. 118

Relation—Dealings—Constructive Fraud—Burden of Proof—Petition Need Not Allege Fraud.

The law not only watches over the transactions between attorney and client, but it often interposes to declare such transactions void. On the other hand, dealings between them are not necessarily void, but the burden of establishing perfect fairness, adequacy and equity is thrown upon the attorney and it is not necessary for the client to allege in his petition that the transaction was fraudulent. 40

Laches—Duty of Client to Look After His Cause of Action.

It is the duty of a defendant to inform the court of the illness of his attorneys, where such facts are within his own knowledge, and to be present in court in person to see that no advantage was taken of him. And in the face of such facts a petitioner will not be acquitted of culpable negligence, or indifference and inattention to his interests. 59

An attorneys statement, made in the absence of his client, not competent evidence against client,—vol. 1, 159.

Attachment—Garnishment—Allowance for Attorneys Fee.

No attorneys fee can be adjudged against a garnishee, who, in order to protect their interest, petitions the court to cause all creditors seeking attachments, to interplead in any one action against them. 583

Attorneys Fee—Two Causes in One Petition.

Where two causes of action are joined in one petition, only one attorney fee can be taxed against the defendant. 211

Attorneys Fee—Defeated Party.

The appellant being defeated in the action, was liable for legal cost but beyond that he ought not to be made to contribute to the payment of the fees of his adversary's counsel. 109

Attorney fee cannot be recovered in a suit on supersedeas bond,—vol. 1, 347.

An attorney is intitled to compensation from any one of the signers of a petition to defeat a large subscription to a railroad through their county,—vol. 1, 421.

The court will not assume champerty in a contract for a retainer, nor infer it without strong proof,—vol. 1, 388.

Continuance of Cause—Withdrawal of Attorney from the Case.

Upon calling of a cause, for trial, if counsel withdraws and has his name stricken from it, it is the duty of the court to continue the action and award a rule against plaintiff to prosecute his suit. A delay for such rule can rarely produce injury when to give judgment immediately upon withdrawal of counsel, is fraught with great danger to the client. 597

The failure of counsel to put in a defense, and no allegation of unavoidable prevention, by attorney or client, will not warrant a reversal,—vol. 1, 90.

Negligence of counsel not grounds for new trial,—vol. 1, 68.

Excessive Fee in Divorce Proceedings.

Though the evidence may show the services of attorneys for the wife, in divorce proceedings, to be worth \$300, in the absence of evidence as to the ability of the husband to make such a payment in that the estate is not ample, the court will not reverse the court below for an allowance of only \$150. 633

In a suit for divorce, wife entitled to reasonable compensation for attorneys fees,—vol. 1, 632.

ATTORNEY AND CLIENT—Continued.

In subsequent suit by husband, wife is restricted to compensation for services in that suit only,—vol. 1, 632.

In a joint action, an attorney cannot represent the plaintiff in some, and defendant in others,—vol. 1, 518.

Attorney must be appointed for non-resident, constructively summoned 60 days before judgment can be rendered against him,—vol. 1, 337.

BAIL.

A bail bond, stipulating for the appearance of a defendant at any other term, than the next after its execution, is void,—vol. 1, 451.

A forfeiture is adjudged, and surety summoned to appear at next term of Circuit Court, and before the term all criminal cases are transferred to a Criminal Court. Held, that Criminal Court would have no jurisdiction,—vol. 1, 573.

A defendant, prevented by military power from appearing before an adjudged forfeiture, presents a good defense,—vol. 1, 452.

BAILMENTS.

Contract—Assumption by Bailee of Debts due Steamboat.

A contract by a bailee to become responsible for all the existing debts of a steamboat, the use of which had been transferred to him, is held to be an obligation only to pay such debts and liabilities as were loans on the boat for their payment, and not for such debts as had been contracted by former bailees for speculation. 389

Custom Must be Certain and Reasonable.

To make a custom and usage a bona fide one, it is a pre-requisite that the custom was certain, and that it was a reasonable one. And of the latter, where parties would charter a steamboat, they could purchase articles to transport on it more valuable than the boat itself, and if it should be liable for the price, the property of the owner could be incumbered and put to hazard, by the reckless conduct of an insolvent bailee. 390

BAR TO ACTION.

Failure to except to a commissioners report though not confirmed, but filed, held to be a bar to a subsequent action,—vol. 1, 440.

An allegation in an answer that the plaintiff was not of age when suit was filed, was a denial of the right and a bar to the action,—vol. 1, 224.

BEQUEST.

Wills—Construction—Second Bequest—Codicil—Revocation.

A bequest to a brother of \$5,000 to be given by him to some charitable purpose, and a codicil which gives to said brother one-eighth of the entire estate, examined and held not to be inconsistent in that both payments should be made out of the estate. 504

One of the beneficiaries under a will, may dispose of his share to the other legatees by gift, to the exclusion of the husband of their deceased sister,—vol. 1, 208.

BETTING.

Not a penal offense to bet a certain person will not be elected to office, unless he be a candidate, is voted for or expected to be a candidate,—vol. 1, 243.

BIDDERS.

Decretal Sales—Extorting Money by Threatening to Open Bidding—Fraudulent Representations.

At a decretal sale in the city of Louisville, where the land was sold to Geo. W. Bayless, for \$9,175, whereupon one Arthur Peter threatened that unless he was paid \$500, by Bayless he would reopen the sale and bid in the property, and the amount was paid him. This petition was filed by the heirs for whom the sale was made, to cancel same on the ground of a fraudulent combination between Bayless and Peter to keep others from bidding on the property. While the Appellate Court would rebuke the dishonorable practice of extorting money by threatening to open bidding, unless the parties to the sale were injured by his conduct, the sale should not be set aside merely to punish them. 405

Decretal Sale—Ostensible and Real Bidders—Parties.

Alcorn and Givens having purchased a farm at decretal sale, executed their bond for the purchase price with D. H. Walker as security. Before this sale was confirmed, they sold the land to Montgomery and delivered to him a title bond, reciting that A. Alcorn, R. H. Givens and D. H. Walker were the parties of the first part. The notes taken for the purchase price were made payable to said Alcorn, Givens and Walker; Held; that Alcorn and Givens, by their own acts in giving the bond and receiving said notes furnished strong evidence that Walker was interested and his interest prima facie appearing, his heirs should have been made parties to the suit to foreclose. 313

Decretal Sale—Resale—Vested Rights.

Where real estate has been regularly and fairly sold at a fair price, the first bidder, having no vested rights before confirmation, cannot complain at a second sale, at which another bids more than he is willing to give. 450

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Assignment after Maturity.

A purchaser of a note, assigned, after maturity, takes it subject to all the equities that it would have been subject to in the hands of the payee. 665

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Notes—Assignment—Credits—Attitude of Assign.

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Assignment Without Recourse.

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A note, taken up by a volunteer, though assigned to him without recourse, is held to be discharged, as against the obligor, in a suit to enforce its collection. 667

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Payment by appellants, of a note of another, against whom suit had been threatened, where he had promised to renew with appellants, as sureties, held to be a binding consideration, in suit to recover from the payee. 667

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Adding the words "interest from the date" to a note after signature and delivery, and without the knowledge or authority of the maker, constitutes such an alteration as will release the maker from the whole amount of the debt. 667

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But should the interest, payable annually, not be paid, the privilege is forfeited,—vol. 1, 16.

Charging ones note against his account by a bank, does not impair the efficacy of the note nor change the character of the debt,—vol. 1, 170.

A note or bond cannot be delivered by the obligor to the obligee in escrow,—vol. 1, 146.

Parol Agreement—Extension of Time on Note, Inadmissible as Evidence.

A mere parol agreement to extend the time of payment of a note would be in contradicton of the note itself, and therefore inadmissible. 365

Notes taken up by a renewal, are competent evidence on a question of usury,—vol. 1, 92.

A note, payable to a parties' own order, evidence of debt, and not a foundation of an action,—vol. 1, 378.

The production and possession of a note is prima facie evidence of ownership,—vol. 1, 240.

Where one member of firm signed firms name to note, it is prima facie evidence of their indebtedness,—vol. 1, 187.

Federal Stamp.

A note on which the original petition was filed having been excluded, on the plea that it was void for want of a revenue stamp. Held, that appellant was estopped from objecting to an amended petition on the oral contract, for which the note was given. 186

Alteration.

A subsequent insertion, by the payee, in a draft, of the name of another as drawee, will operate to discharge the endorser,—vol. 1, 515

Action on Demand Draft—Abatement—Premature Suit—Demurrer.

In an action on a demand draft, where the answer avers that the time of payment by agreement between the drawer and drawee, had been extended some four months, it is error to sustain a dmurrer to the answer. 600

Such a mistake, admitted or indisputably proved, would have entitled the defendants to an abatement of the answer, and as between drawer and drawee, an admissible defense. 1b.

Consideration—Failure of.

A note given for the purpose of securing the discharge of one from the Army, is held to constitute a valid consideration, as to counsel and assist a man to obtain his discharge in a legal manner is neither illegal nor against public policy. 547

In suit on a note if a plea of want of consideration is made, the burden of proof is on defendant,—vol. 1, 285.

Dual relation of an obligor and endorser, see vol. 1, 42.

Gift in Contemplation of Death.

The delivery of a note to a possible future heir of the donor, who was old and in feeble health, would not amount to a donatio mortis causa, where the gift was accompanied by the statement that it was to take effect if he died, he being at the time very feeble, and believing that he could not live long, and stating that if he did not die, and lived to need it the note could be returned to him. The donor lived for several months afterwards and the pleadings show nothing to intimate that the donor died of the same illness existing at the time of the alleged donation.....380

Lien—Interest.

A purchase money note, carrying specific installments of interest to be paid, being secured by a lien on the land, the accrued interest thereon was an incident secured and protected by all the safeguards which surrounded and secured the principal, and a lien would attach for such interest, though the principal be not due. 229

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Computation of interest, where partial payments are made,—vol. 1, 504.
Assignments—Notice—Set Off.

Where a promissory note has been assigned without the knowledge of the payee, he is entitled to a set-off against the same to the amount he had paid the assignor before he knew of the assignment. 121

Parol assignment will operate as an equitable transfer of indemnity, against loss by endorsement of another note,—vol. 1, 382.

A purchaser of the interest of a payee in a note becomes invested with the equitable title, and becomes subrogated to his rights,—vol. 1, 600.

A parol agreement cannot destroy the obligatory effect of a note,—vol. 1, 146.

Usury—Voluntary Payment on Note Before Due, Does not Stop Interest.

The voluntary payment on a note before its maturity, gives the payor no right to stop interest; therefore only so much as was paid over and above the legal interest, on the sum borrowed, would be usurious. An over-payment thus made of \$48.03 is a sum of which the Appellate Court has no jurisdiction. 287

Contract for Payment in Lumber.

A contract for delivery at a given point, of personal property, in settlement of notes, though the property be not accepted, the debtor is entitled to recover against the creditor the value of such of the property as was lost by reason of the creditors negligence. 476

Payments of notes given for the joint purchase of lands and personalty should be applied pro rata,—vol. 1, 86.

Pleading—Allegations in Petition.

In a suit on a note, the possession of same by the plaintiff and filing it with the petition, is sufficient to authorize a recovery of the amount due on same, although no distinct averments are made in the petition that the note had been transferred by delivery to plaintiff, together with an affidavit that it was just and due and that he ought to recover the amount of same. 261

Fraudulent Sale to Hinder and Delay Creditors.

Haggins made application of Fry to secure for him \$5,000. Brent conducted negotiations. Fry sought and secured the money from one W. W. North, son of and agent for A. M. North. The notes of Haggins were made to and endorsed by Brent, and delivered to W. W. North. Held to be a loan of money and not a sale of notes to A. M. North. 474

Statute of Limitations—Renewal of Notes—Usury.

A substitution of new notes for old ones, where none of the principal is paid, is a continuance of the loan, and the statute of limitations will not bar a recovery of any usury paid thereon. 474

Statute of Limitations—Presumptive Evidence of Payment.

Lapse of time cannot operate as a statutory bar to an action on a note, its only legal effect being presumptive evidence of payment as pleaded. A payment not pleaded, cannot be presumed. 560

Co-Sureties—Presumptive Notice.

C. J. Taylor and Merrill were principals in a note given by them for borrowed money while they were partners in business. A new note was given by them in lieu of the old one, signed C. J. Taylor, and Merrill "surety." S. P. and J. S. Taylor also signed the last note as sureties. Held, that the word "surety" after the name of Merrill may have been presumptive notice to the other parties, of the character in which he assumed to bind himself, this would not make him the co-surety of S. P. and J. G. Taylor unless he had ceased to stand, as between him and C. J. Taylor, in the attitude of principal in the original debt. 576

The evidence showed that on the dissolution of the partnership, C. J. Taylor undertook to collect the means of the firm and out of that, pay the debts. This would not change the character of Merrill's responsibility

BILLS AND NOTES—Continued.

from principal to surety. Until this agreement was fully carried out, the obligations were the debt of both. 576

Surety—Acceptance of Holder, of a Future Order for Collection to be Applied on.

The acceptance of an order from the obligor on a note, by the creditor payable on a third party at a future time, does not operate as a stay of proceedings on the note against the obligor and sureties, nor compels the creditor to delay proceedings until such time as default on the order be made. It is merely an acceptance as collateral security for the debt....365

The fact that an obligee, under promise to do so, failed to secure additional surety on the note, is no defense to it,—vol. 1, 146.

Same—He can only be held liable for damages done the promisee,—vol. 1, 146.

Same—Which may be done by counter-claim in the same suit,—Ib.

Payments made on note by obligor before assignment or transfer, though not entered,—vol. 1, 281.

Assignment of does not deprive surety of right of limitations, nor require him to give notice of such to the payee,—vol. 1, 541.

Waiver of Claim for Set-Off—Declaration in Presence of Purchaser.

Where the maker of a note is present when a transfer thereof is made from one holder to another, and offers no objections thereto, but says that the note is good and offers to settle it by delivery to the holder of other collateral therefor, he will be considered as having waived any claims, demands, or off-sets he may have to the note. 284

Usury, Waiver of Claim for—Administrators.

An obligor and sureties in a note, have the right to claim usurious payment of interest on a note, given a deceased, while that note is in the hands of the administrator. 616

BILL OF EXCEPTIONS.

Amended Answer—Not Permitted to Be Filed.

Where the lower court erred in not permitting the amended pleading to be filed, the error is not available in the Appellate Court, as it was not made part of the record by a bill of exceptions or order of the court identifying it. 222

Filing of Same—Nunc Pro Tunc.

A bill of exceptions, filed some four months after an order of court granting leave to file same October 26, 1867, and "time until Saturday next is given to file a bill of exceptions on February 29, 1868, leave is given to "withdraw bill of exceptions filed in case No. 1703, and file in this case," and again on March 7, the court granted leave to file same "in this case nunc pro tunc as of November, 1867," is held to be too late under any view of the case. 583

Time to File.

A bill of exception filed at a subsequent term of the court with an order extending the time, will not be considered by the Court of Appeals...181

Filed at Special Term, Without Objection.

Objections not made to the filing of a bill of exceptions at a special term of the lower court, cannot be made for the first time in the Court of Appeals. 223

To enable the Appellate Court to decide as to the correctness of filing amended petition, it must be incorporated in the bill of exceptions.—vol. 1, 537.

A bill of exceptions cannot be filed in vacation,—vol. 1, 370.

Extension of time must be until a day in the next term of court,—vol. 1, 370.

BILL OF EXCEPTIONS—Continued.

Evidence, as embodied in the bill of exceptions at first trial, can be used in second,—vol. 1, 482.

Bill of exceptions must contain all the instructions given by the court,—vol. 1, 316.

BILL OF EXCHANGE.

Limitation—Subsequent Promise Must Be alleged.

When an action on a bill of exchange is barred by limitation, which is pleaded, and a subsequent promise to pay is relied on it must be alleged, and the statement that one deems himself bound for the debt cannot be construed to be an unconditional promise to pay. 79

Set-Off and Counter-Claim.

Set-offs and counter-claims between the original parties cannot be adjudged against an assignee as to bills of exchange, which have gone into circulation in the regular course of business, for a valuable consideration.271

Endorsers—Action on Without Proof of Dishonor.

In the absence of allegation in a petition on a bill of exchange, of notice of dishonor no action can be maintained against the endorsers, where no proof of notice of dishonor is shown. 241

Pleading—Petition—Demurrer.

In a suit on a promissory note or bill of exchange, and the petition does not aver protest, and notice, either for non-acceptance or non-payment nor aver any excuse as that the drawer had no funds with, or authority from the drawer to draw upon him, the petition is subject to a general demurrer. 271

Failure to Present for Payment or Pretext—Excuse—Liability of Endorsers.

Commercial intercourse having been entirely suspended between Kentucky and the city of New Orleans, at which place the bill was payable at the time of maturity, the failure of the holder to present it for payment or protest at that time, did not operate to release the endorser.....77

A bill of exchange, unstamped, according to the Act of Congress, is not invalid,—vol. 1, 487.

In the absence of proof to the contrary, a bill of exchange is supposed to have been endorsed before it became due,—vol. 1, 487.

BILL OF REVIEW.

Newly Discovered Evidence.

In the absence of an allegation in a bill of review, that evidence, offered to sustain same, might not, by ordinary diligence, have been discovered in time to have been used on the first hearing, it is not error to dismiss the proceedings. 548

BILL OF SALE.

Attachment—Grounds for—Fraudulent Intent to Prefer Creditors.

M. Onanpelt, having agreed to mortgage certain property to Hodge, as collateral security, shortly thereafter by bill of sale transferred all his property to one Kuglar, but possession not actually being delivered. All done in seeming contemplation of his removal from the State. Held to be sufficient to sustain an attachment by the creditor, Hodge. 239

Lien Reserved—Unrecorded—Subsequent Mortgage—Actual Notice.

Although a bill of sale, in which a lien has been reserved has not been recorded, it is superior to the lien of a subsequent mortgagee who had actual notice of the unrecorded lien. 140

BONA FIDE PURCHASER.

Vendor and Purchaser—Bona Fide Purchaser of an Expectancy.

The purchaser of an expectancy of a vendee, with knowledge that the

BONA FIDE PURCHASER—Continued.

interest of the claimants who had sold by executory contract to his vendor, held only a resulting trust, assigned to a third party, to take effect at the death of his vendor; is held not to be a bona fide purchaser, to defeat the repayment of the amount thus paid for the expectancy of the heirs, by such third party. 354

Ouster.

The purchasers of a portion of said land, from the execution purchaser, for a valuable consideration, without notice of the equity of co-heirs, cannot be divested of their holdings, in a subsequent suit by such heirs.....625

A bona fide purchaser, for a valuable consideration, without notice, of land sold by fraud or coercion, cannot be ousted,—vol. 1, 258.

BONDS.**Summons—Constructive Service—Failure to Execute Bond—Appearance in Court of Appeals Cures Defect.**

The appearance of a defendant in the Court of Appeals cures a defect of the failure to execute bond in the court below by an appellant in a suit on a note. 261

Attachment bond as required by sec. 440, Civil Code, see vol. 1, 299.

Distributee or legatee must enter into bond, before receiving his legacy—see vol. 1, 302.

Construction of Its Sufficiency—Release of Surety—Rights of Wards to Sue Guardian or One or More of the Sureties.

A bond that does not show the name of the guardian, ward or surety, though signed by guardian and his surety, is held not to be a sufficient bond as is required by Statute, or sufficient as an indemnity to a former surety who makes demand for new security, and will therefore not release the former surety. The wards have the right to sue the guardian alone, or with one or more of his sureties, and a judgment against one of such sureties, he cannot reverse because the other sureties were not made parties to the suit. 202

Covenants—Bond to Commonwealth for Benefit of Minor Heirs—Sales.

The entering into a covenant to the Commonwealth, by a guardian desiring the sale of property, belonging to minors, with security stipulating for the benefit of the infant heirs, a faithful performance of his duties as guardian, and that he would perform the orders of the court, is essentially and lawfully in every legal sense, a bond to such minor heirs and wards separately and collectively. 335

Guardian's Bond—Counter Security—Right of County Court to Release.

When it is required of a guardian, and he gives his surety counter-security it may be proper and the county court might be authorized to release the surety requiring the counter security of the guardian. But until such requirement is complied with the court has no authority to release any surety. 202

The counter-security contemplated and required is the execution of a bond or covenant by the guardian with one or more good sureties, approved by the court, who must undertake faithfully to discharge the trust of guardian and to secure the surety making the application from loss and all the liabilities he may have incurred by reason of having been bound as the surety of the guardian. Less than that, the court has no legal power to do, and until that is done, the former surety remains bound. 202

Sureties on administrator's bond in court liable for proper disposition of funds,—vol. 1, 224.

Same—Though sureties in county court liable for amount paid over by commissioner,—Ib.

Ward not bound to sue sureties in both the county and circuit court bonds, jointly,—vol. 1, 40.

A statute requiring guardian to give bond to an infant is not violated where it is made payable to the State,—vol. 1, 130.

BONDS—Continued

Appeal Bonds—Injunction Bonds—Liability—Confessed—Failure to Answer—Same—Preliminary Suits.

The entire liability being confessed by failing to answer the allegation charging it, there was no necessity for preliminary suits on the appeal and injunction bonds 94

Injunction—Conversion of Property Under—Liability on Bond.

On the dissolution of an injunction, personal property can be surrendered by the plaintiff to the defendant; the detention could not be treated as a conversion of them by the plaintiff, he being liable on his bond in consequence of the injunction, to the defendant for any damages sustained by him. 279

Indemnifying Bond—Execution Sale—Sheriff.

In the absence of proof or notice that property levied on under an execution belongs to other than the execution debtor, the sheriff has no right to require an indemnifying bond. 622

Where bond is tendered when execution levy is directed, the sheriff cannot complain, that no bond was given before the levy, the tender not being accepted,—vol. 1, 259.

Personal Representation—Suit on Bond—Form of Judgment.

By failure to answer the appellant admits that she has assets in her hand sufficient to pay the debt, but the judgment is rendered against her *de propriis bonis*. Held, that the judgment cannot be sustained in the form in which it is rendered, it should have been rendered to be levied of assets in her hands. 86

Sale of Property by Court Without Re-investment.

When a married woman, over 21 years of age, desires a sale of an inheritance, by order of court, without a reinvestment thereof, but the fund to be placed under the control of her husband, without bond, she will be estopped from attacking the sale thereafter, especially when she had joined her husband in a subsequent confirmation of the title. 335

A wife claiming coverture in a suit on her note, will be held liable on her title bond, formerly taken up by the note,—vol. 1, 218.

It is error to render judgment against a non-resident before bond is executed,—vol. 1, 454.

Renewal of bond by trustees of jury fund containing only one of former sureties, if accepted by the court, is a renewal in entirety,—vol. 1, 238.

A receiver should execute bond before entering on discharge of his duties,—vol. 1, 518.

Execution—Validity of Judgment—Surrender of Property—Estate.

The execution of a replevin bond and the subsequent surrender of property to be sold under an execution issued on the replevin bond, operates to estop the party so doing and his vendee from claiming an interest in the land so surrendered. 109

Upon entering into a recognizance at the examining trial, a defendant's former bond is discharged,—vol. 1, 565.

Judgment in Favor of Sureties—Sureties' Right to Collect Debt.

A judgment against the principal in favor of the sureties on his bond, who had not paid the debt, should be for the payment of the amount to the holders of the unpaid debt; the sureties have no right to collect the money. 161

Surety in original bond in county court is released, when new bond is made on appeal to circuit court,—vol. 1, 25.

Mistake in clerk in omitting proper order for counter surety, for the purpose of releasing former bond,—see vol. 1, 25.

Surety on attachment bond not liable in attachment against a firm, and sustained as to one, and dismissed as to the other member,—vol. 1, 195.

Where one of several sureties fails to join the others in requiring counter security, he is equally bound with sureties in new bond,—vol. 1, 513.

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Land—Decretal Sale—Bond for Purchase Price—Reasonable Time to Perfect Title—Resale—Difference in Price.

The purchaser of land at decretal sale will be required to execute bond for purchase money, if he can get a good title at the time of the sale or in a reasonable time thereafter, and in case of his failing to do so, the land may be resold, and if it does not then sell for as much as he bid for it, he would be responsible for the difference. 64

BOND FOR TITLE.

Assignment—Warranty of Title.

An assignment of a bond for a conveyance of land does not import a warranty of the title. 222

Bond for Title for Conveyance of Land to Defraud Creditors—Equity.

A court of equity will not enforce a conveyance of land under a bond for title given by the intestate for the purpose of defrauding creditors, even though the creditors of the intestate did not join in the bill to set aside the contract bond. 170

Fraudulent Conveyance—Rights of Creditors.

D. A. Davis purchased some land from one Calyer and received a title bond therefor, and shortly thereafter assigned said bond to his father-in-law, the appellant. Davis appeared to have been insolvent at the time of the purchase and the transfer of the bond, but continued to occupy the land, and made the payments due to Calyer as part of the purchase price for some time after the transfer of said bond to appellant. Held, that the assignment of the bond was fictitious and fraudulent as to creditors.....289

Resulting Trust—Expectancy.

A father who holds the bonds of his children to convey to him their expectancy to be derived from the estate of their deceased mother, transferred said bonds by assignments to his son. In a suit to enforce the executory contracts, the father, though not being possessed of the legal title to land, and having agreed not to dispose of his equity, with notice to his vendee, the legal title cannot be coerced at the instance of the heirs so as to defeat the equity of the purchaser of their expectant interest, by a third party. They are deemed, in equity by their bonds, to be the holders of the legal title in trust for their father during his life, and with remainder to their vendee, at his death. 354

Holder Entitled to Conveyance from Heirs or devisees.

The holder of a title bond is entitled to a conveyance of the legal title, whether the obligor died intestate or testate. 218

Specific Performance—Sales.

Under a sale of land by bond for title, neither party being in fault as to the defective title, the vendees remedy is for a specific execution, and not for recovery of the consideration money. 546

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BOUNDARIES.

Land and Conveyance—Adverse Possession.

The possession of land under an older patent, constructively puts the party in possession, up to the patent boundaries, which constructive possession cannot subsequently be ousted under a junior patent only by actual enclosed possession. 578

Landmarks—Establishment by Long Recognition—Lands and Conveyances.

Where the original owners of lands recognize a specific line or landmark in conveyances, as a boundary, and their vendees for more than twenty-five years afterwards, accepted and used such recognition, such a boundary will not be disturbed. Such boundary will not be affected by a junior conveyance, attempting to go beyond the line, a prior conveyance having included the land in the junior one, down to the boundary in controversy...232

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Patents—Meanders of River—Accidental Divergence.

A patent in a survey that calls to run from a point of beginning with the meanders of a river, necessarily imports that the river is the boundary. And though the courses and distances as designated may not always correspond with the sinuosities of the river, yet, as in all other cases of apparent and generally accidental divergence, the natural boundary controls and defines the land appropriated. 612

BROKERS.

Stock Brokers—Specific Contract—Custom and Usage Amongst Brokers.

Where in the pleadings, there is a conflict as to the terms of a contract between stock brokers, and no evidence tending to establish the agreement, the court will assume the contract to be according to the custom and usage between brokers and their customers in relation to transactions of a like character. 499

A broker is bound to obey strictly the orders of his customers or principal in relation to keeping or disposing of stocks in his hands, and so long as the principal keeps up his margin, the broker is not authorized to dispose of the stocks; should he do so he would be liable to his principal for the highest price the stocks may have attained during the time of the transaction..499

Duty to Protect Interest of Client—Actions Against.

When a firm of brokers, acting on the request of their client, to replace a purchase made for him on a prior transaction, buys the commodity at the price at which it had been previously sold to protect the interest of the client, he cannot be heard to complain of a loss to him sustained thereby, although he may have repudiated the second purchase, on the day it was made. 244

BURDEN OF PROOF.

Attorney and Client—Relation—Dealings—Constructive Fraud—Petition Need Not Allege Fraud.

The law not only watches over the transactions between attorney and client, but it often interposes to declare such transactions void. On the other hand, dealings between them are not necessarily void, but the burden of establishing perfect fairness, adequacy and equity is thrown upon the attorney and it is not necessary for the client to allege in his petition that the transaction was fraudulent. 40

Agency—Establishment of.

The burden of proving an agency is on the one claiming to act as such..33

Same—Contracts—Writing Evidencing—Presumption—Mistake and Oversight.

The presumption of both law and facts are that the written memorial contains all the covenants of the parties and he that asserts it does not (but that some were left out by mistake or oversight), must bear the burden of proof. 30

Land—Sale of—Failure of Title—Fraud and Mistake—Rescission.

It is a well established principle that a purchaser who has accepted a conveyance cannot afterwards have a rescission of the contract unless it be for fraud or mistake shown to have operated on him when he accepted the deed and the burden of proof is on the party alleging fraud and mistake..35

Appeals—Limitation—Judgment Presumed to Be Rendered on Last Day of Term—Extension of Term.

It may be presumed that a judgment was rendered on the last day of the term, where there is nothing to the contrary. The burden is on the appellant to show that the term fixed by law was extended. 153

Replication—Pleadings.

Where a replication states facts, which if proved, would countervail the import of the recital of a consideration in a deed offered by a defendant, and controverts the material allegations of a counter-claim, the burden of proof is on the defendant. 333

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The price for which property was rented, under a contract, is prima facie the value of the use of the property, and the burden of proof is on defendants to show that they could only get for it the amount reported as received by them. 329

Deeds—True Consideration.

The burden of proof is on the parties to a voluntary conveyance, to show that a stated consideration, admitted by them to be erroneous, is not valid and nothing is owing thereon. 463

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Strangers or other person not bound to enquire of the agency of one found at depot,—vol. 1, 133.

A purchaser of assets of a railroad corporation under order of court, not liable for debts of the company,—vol. 1, 618.

Same—Nor liable for unpaid right-of-way sold to first organization,—Ib.

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Right to recover damages for loss of goods by carrier, may be assigned,—vol. 1, 133.

Carrier held liable for failure to deliver goods delivered at its depot to one in charge though not an agent of company,—vol. 1, 133.

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CAUSE OF ACTION.

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The statutory bar provided by said chapter did not embrace pre-existing causes of action,—vol. 1, 582.

Information sufficient to form belief of cause of action,—vol. 1, 71.

CESTUI QUE TRUST.

Acquiescence by Beneficiary Under Sales of Cestui Que Trust.

Where land is transferred to cestui que trust an implied contract, acquiesced in for a period of 20 years thereafter, in sales made thereunder, for an adequate price of the land at its then value, will bar any subsequent right of the beneficiary to revoke the sale under the imputation of constructive fraud. 188

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Deed—Acknowledgment.

The acknowledgment to a deed that the grantor appeared before the "clerk of Logan county," and wherefrom the caption it appears that the acknowledgment was taken in the "county clerk's office," is held to be good, though the word "court" is omitted after the word "county." But as it must be judicially known that there was no clerk of "Logan county," while there was a clerk of the county court of said county, it is presumed that he, as such, was by law authorized to take the acknowledgment. 269

A certificate of secretary of foreign state sufficient to prove a bank legally incorporated,—vol. 1, 345.

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Civil Actions—General Character.

The rule in civil action is that evidence of the general character of a party to the action, is never admissible; unless the action involves the general character, or directly affects it. 316

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Actions.

An action cannot be maintained in the name of one for the sole benefit of another under a champertous agreement. 144

The court will not presume champerty nor infer it without strong proof,—vol. 1, 388.

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CHOSÉS IN ACTION.

Choses in Action—Pass by Donation.

Not only negotiable notes, and bills of exchange, payable to bearer, or endorsed in blank, and bank notes, but promissory notes not made payable to "bearer" without an assignment from the payees' donor may be the subject of a donatio mortis causa, as the beneficial interest therein may pass by delivery. 380

CHARGE ON PROPERTY.

Where an estate is devised to a son, charged with the support of the testators' relief for life, this becomes a charge on the property,—vol. 1, 273.

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Attachment—Successful Claimant.

In an attachment suit, where a claimant is successful in sustaining his claim to part of the property, it is error to adjudge the costs of the suit against him, though the attachment be sustained in all other particulars. 238

Attorneys Fee—Defeated Party.

The appellant being defeated in the action, was liable for legal cost, but beyond that he ought not to be made to contribute to the payment of the fees of his adversary's counsel. 109

Divorce.

Under Sec. 32, Chap. 25, Rev. Stat. requiring the husband to pay all costs of a divorce suit, where the wife is not in fault, held, that though the lower court granted the relief of the plaintiff, for which a reversal could not be had costs were properly adjudged against him on evidence, the wife proving their separation to be only temporary. 533
Costs against husband in wife's suit for divorce,—vol. 1, 632.

Defective Title Cured during Pending of Suit for Purchase Money.

A defendant to a suit to enforce a purchase money claim, is entitled to a judgment for costs, where the defect to the title is cured during the pending litigation. 469

Garnishee—Not Liable for Costs.

Unless a garnishee resists the claim against them in an equitable action by attachment, no costs can be recovered against him, especially where the litigation is prolonged by the negligence of the attaching creditors. 583

Sales—Oppressive Costs.

A sale upon lands upon which a lien created, to reimburse the wife, is held unjudicial, where the value of the land is shown to be more than the price paid by the wife for which she holds a lien, and would create inconvenience and oppressiveness in its costs. 488

Plaintiff Entitled to His Costs when Petition Corrects Errors.

Where, in a petition by the plaintiff, he succeeds in correcting mistakes charged therein, he is entitled to recover his costs, though the petition may not be sustained and relief granted as prayed for. 243

The plaintiff is entitled to his cost, although his action is practically defeated. 177

Pleadings—Answer—Judgment for Costs.

The answer was not sufficient to escape a judgment for costs, but was an sion of a lot belonging to the plaintiffs," it not a denial that she was in possession in fact, but only that her possession is unlawful, nor construed as a plain and simple denial of the title alleged in the petition. Nor does a denial "that she keeps plaintiff out of his rightful property" deny that she held the ground nor that it was the property of the co-plaintiff.

COSTS—Continued.

The answer was not sufficient to escape a judgment for costs, but was an admission of title in the plaintiffs, and of her own possession. 212
Surety.

Liability of surety on bond, for costs in misdemeanor cases,—vol. 1, 423.

CO-TENANCY.

Reservation by one co-tenant, in subjecting property owned jointly, to debts of the other,—vol. 1, 335.

COUNTERCLAIM.

A counterclaim must be a cause of action,—vol. 1, 328.

Pleading—Answer, Sufficient as a Counter-Claim.

An answer, though deficient in not stating the terms of a contract, whether written or oral, where it substantially alleges fraudulent misrepresentations and specified damages resulting therefrom, will be good as a counter-claim. 312

May be set up by one partner, after judgment has been rendered against the other by default,—vol. 1, 386.

An answer, though not good as a bar to an action, may be sufficient as a counter-claim,—vol. 1, *Id.*

Injured party, by counter-claim, may recover for damages sustained by failure of obligee to secure promised additional surety on a note,—vol. 1, 146.

Defective Title—Pleading.

A defect in the title to land, is properly the subject of a counter-claim, in a suit to enforce purchase money notes. 469

Set-off—Statutes of Limitation.

The Statutes of Limitation may run against a set-off but not against a counter-claim. 67

Pleadings—Answer—Offset—Issue in Bar.

The answer of the defendant was not an off-set or counter-claim, but presented an issue in bar, which by the provision of the Civil Code, stood denied except as conferred by the statements of the petition. 124

A covenant of warranty of a "Jack" cannot be a foundation of a counter-claim,—vol. 1, 400.

COURTS.

Damages—Value—Amount—Taken as True—Law and Facts Submitted to the Court.

The "Law and Facts having been submitted to the court without the intervention of a jury, and the court being advised etc, adjudged etc." Held, that the foregoing recital very clearly implies that a trial by a jury was waived and the facts as well as the law submitted to the court. Therefore, it will be presumed that every fact was proven necessary to authorize the judgment. 457

Contract—Building Court House—County Judge as Contractor.

While the official duties of a Count Judge requires that he should participate actively in arranging the erection of the public buildings of the county, there is no statutory inhibition against him bidding for and securing the contract, where it is not shown that he derived any special benefit, nor did anything unfair in awarding the contract. 439

Discretion of Court to set Aside Judgment.

Acting under Sec. 800, Civ. C. the Chancellor, suspended a judgment rendered, within the prescribed time, held, that having thus retained the power, within a reasonable time thereafter, to set aside the verdict, he did not abuse a legal discretion in subsequently doing so. 662

Mandate of Appellate Court—Duty of Judge of Lower Court to Obey.

It is not discretionary with a Judge of the lower Court to enter the mandate of the Court of Appeals. When such a mandate, accompanied

COURTS—Continued.

with a motion for judgment, is presented, same must be entered, and final judgment given. 240

Arbitration and Award—Affirmance or Decision by Circuit Court.

An award made by arbitrators, not named by the court but to be chosen by the parties litigant, is valid and binding, where the record shows who were chosen arbitrators, that they were sworn, that the award was made and signed by one of them and the umpire, and that copies were furnished to each party, and where the parties, with their witnesses and counsel appeared before the board on the day set for the hearing, and all fully heard. 247

Same—Transfer from Circuit Court to Common Pleas Court, Transfer of Causes.

The act fixing the commencement of the first term in September was a public notice to all litigants when and where their suits would be adjudicated. 225

Administrators—County Court Settlement Prima Facie Right—Surcharge.

A settlement made by an administrator, with the County Court is prima facie right, but when the administrator seeks to subject land descended to the heirs and they surcharge the settlement, and show errors, this prima facie presumption is greatly weakened. 369

A county court has no jurisdiction to divide heirs personal property, which cannot be divided in kind,—vol. 1, 272.

Summons of a defendant to attend court, terms of which has been changed by Legislature,—vol. 1, 69.

Mode and Time of Sale—Discretion of the Court—Consent of Infants.

No other law than the deed of trust and the sound discretion of the court prescribes the mode or time of sale. The court has the power to make a sale without the consent of the infant beneficiaries. 90

Courts discretion in permitting a second, or amended answer to be filed,—vol. 1, 620.

Bond—Sale of Property by Court Without Reinvestment.

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COVENANT.

A covenant in a note that it may be extended at the payors pleasure, is valid,—vol. 1, 491.

Bond to Commonwealth for Benefit of Minor Heirs—Sales.

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Misdescription in Deed Corrected—Contract for Exchange of Lands—Breach of Covenant.

Under a contract for exchange of lands, a deed made subsequent thereto in which the property is misdescribed, will be corrected by a chancery proceeding. A mere misdescription in a deed is not a breach of warranty nor grounds for a rescission of contract between the parties. 206

Breach of covenant in notes, assigned, and in the hands of attorney for collection,—vol. 1, 214.

Divorce.

A contract of separation by husband and wife, with a provision which obligated the wife not to impose on him any liability "nor in any man-

COVENANT—Continued.

ner whatever, make him or his estate responsible for any money or debts other than the note before mentioned," held not a guarantee against an allowance, pendente lite, by the court of \$300 for the maintenance of the wife. 533

Subsequent Purchasers.

Land conveyed by bond for title, with reservation of legal title, is notice and binding on subsequent purchasers,—vol. 1, 186.

Substantial performance of conditions of covenant,—vol. 1, 228.

Contracts—Specific Execution.

A covenant by several obligors to pay certain debts out of any church funds that may come into their hands, will render them personally liable for a breach thereof, where such funds were proven to have been received

Liberal construction of agreement in a special covenant of R. R. Co., to

Liberal construction of agreement in a special covenant of R. R. Co., to build line of road in a particular way,—vol. 1, 228.

CONVERSION.

Injunction—Conversion of Property Under—Liability on Bond.

On the dissolution of an injunction, personal property can be surrendered by the plaintiff to the defendant; the detention could not be treated as a conversion of them by the plaintiff, he being liable on his bond in consequence of the injunction, to the defendant for any damages sustained by him. 279

Conversion Made in Former Suits.

The appellant in a suit with Griggs in 1838 alleged that Davis owned the land to a line even 26 poles higher up the river than that fixed by the processioner. These record concessions are alone persuasive, if not conclusive, against the appellant. 137

COVERTURE.

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An attaching creditor has no lien on fund derived from sale of debtors property, except that upon which his attachment levied,—vol. 1, 466.

Insolvency of vendor, and that the sale was made to prefer a creditor, necessary facts to constitute an assignment, for, etc,—vol. 1, 392.

Claim of creditor as against fraudulent grantee of debtor,—vol. 1, 230.

Female Guardian—Funds Belonging to Ward which Passes to Husbands Hands—Priority of Claims as to General Creditors.

Creditors cannot claim priority over ward's rights in funds which have passed into the hands of the husband of her guardian, as the use of the ward's money without personal security was a violation of the wives fiducial duties which attached fiducial responsibilities. 298

Executions—Nulla Bona—Prior Liens—Equity Jurisdiction—Creditors.

A return of nulla bona by reason of an assertion of a prior lien, gives to a court of equity jurisdiction to clear the title, it not being material to the judgment debtor, whether the lien was right or not.

Creditors alone are concerned in the distribution of the proceeds of a sale under execution. 674

Judgment Creditor—Actions—Officers Negligence.

The effort of a judgment creditor to make his debt by causing another execution to issue, after the sheriff failed to execute the former one, will be no defense for the officer to an action against him for his official delinquencies. 352

CREDITORS—Continued.

Mortgages—Sale of Property Under Execution—Installments Not Due.

Where a judgment directs the commissioner to sell so much of the land as may be necessary to pay the installment of the purchase money then due and sued for if the whole tract would not bring more or not even enough to pay same, that fact would not deprive the judgment creditor of his right to his judgment and the execution thereof, other installments being not yet due. 556

Preferring Creditors.

A trustee is not entitled to the exclusive privilege of having the debts of the assignor, for which he was bound, as surety, paid in full before the other creditors are allowed to participate. 398

Sale of Debts without Consent of Creditors.

A trustee has no right to sell debts owing the assignor at a sacrifice, without the consent of the creditors.

A trustee had no right to consent to the assignor collecting the debts without the consent of the creditors. 398

CREDITOR'S SUIT.

Bills and Notes—Fraudulent Sale to Hinder and Delay Creditors.

Two notes were given to Benton, by A. M. and Z. C. Merrill. Benton then placed both notes in the hands of Richardson for collection and then assigned the receipt of Richardson to Crawford. In the absence of proof of a valid sale for a valuable consideration, or a satisfactory explanation as to the different transfers, it is held that creditors of Benton could attack the attempted collection of the notes by Crawford, as having been transferred to defraud creditors. 594

Fraudulent Conveyance—Rights of Creditors.

D. A. Davis purchased some land from one Calzer and received a title bond therefor, and shortly thereafter assigned said bond to his father-in-law, the appellant. Davis appeared to have been insolvent at the time of the purchase and the transfer of the bond, but continued to occupy the land, and made the payments due to Calzer as part of the purchase price for some time after the transfer of said bond to appellant. Held, that the assignment of the bond was fictitious and fraudulent as to creditors. 289

Lien Created by Payment by Wife.

In a suit by a creditor to subject the lands in the name of the wife, conveyed to her by her insolvent husband, it is held that the wife will have a prior lien thereon for moneys she paid for the land out of her individual means. 488

Same—Sales—Oppressive Costs.

A sale of the lands upon which a lien is thus created, to reimburse the wife, is held unjudicial where the value of the land is shown to be no more than the price paid by the wife for which she holds a lien, and would create inconvenience and oppressiveness in its costs. 488

Fraudulent Conveyance—Husband and Wife.

Upon dissolution of a partnership, the partners conveyed lands they owned, to the wife of one of the partners, in consideration of her assumption of two debts they owed. This conveyance was attacked by creditors as fraudulent. The wife claimed, as part consideration as payment, \$500 she had invested in the business. Held that the land must be considered as liable to the debts of the insolvent husbands, and subject to rights of creditors. 319

Parent and Child—Fraudulent Conveyance from Father to Son.

A deed of gift from a father to his infant son, who had no means, nor where shown that the son had secured funds with which to pay the consideration stated, the father at the time being heavily involved, is held to be fraudulent and without consideration as to creditors of the father. 309

CREDITOR'S SUIT—Continued.

Conveyance to Prefer Creditors—Failure to File Suit in Time.

In order that a mortgage, alleged to have been given to prefer creditors, may be attacked, action must be commenced within the time required by 1 v. R. S. page 553 by some creditor. 509

Fraudulent Conveyance—Participation by Vendees.

In the absence of proof of knowledge of or participation in a conveyance of land by a defendant, by the vendees, held, not to constitute a fraud upon any creditor, especially where no proof is offered as to the insolvency of the defendant at the time of the transfer. 525

Partnership—Disclosing Name of Individual Parties.

Unless the real names of the individual partners to a partnership are disclosed, the creditors will be presumed to have supposed the business was owned by those in control of, and who conducted same, as their individual place of business. 319

Voluntary Conveyances—Subsequent Debt.

A voluntary conveyance, without consideration, cannot be avoided on that account alone, by creditors whose debt occurred subsequent to the execution of the deed. 463

Balance of Purchase Price, Unpaid, Subject to Debts.

The residue of the unpaid purchase price due under a voluntary conveyance is subject to execution by creditors, whose debt accrued subsequent thereto. 463

Sale, mortgage and lien to secure one creditor to exclusion of others,—vol. 1, 50.

Right of vigilant creditor to secure his debt, *Id.*

Creditor must claim benefit of transfer, for fraudulent purposes, within six months,—vol. 1, 50.

Mortgage within exceptions of Statute of 1856,—vol. 1, 51.

CRIMINAL LAW.

Jurisdiction of courts over offense of passing counterfeit national bank notes,—vol. 1, 531.

Indictment sufficient, when it gives a general description of denomination, bank and to whom passed,—*Ib.*

Conversations between plaintiff and witness of defendant, brought out at trial by defendant, competent evidence,—vol. 1, 436.

Criminal Code—New Trial—Refusal to Grant.

Under Section 349, Criminal Code, it is provided that an error in granting or refusing a new trial shall not be cause for reversal. Under these provisions it is obvious that the sufficiency of the evidence to sustain a charge in an indictment, cannot be enquired into by the Appellate Court, nor the judgment reversed on that ground. 251

Indictment.

To sustain indictment, must show party was a candidate, was voted for, or intended to be voted for,—vol. 1, 243.

Indictment not supported by the evidence, entitles defendant to peremptory instruction,—*Ib.*

Indictment for betting on election,—vol. 1, 243.

Indictment—Offense of a Breach of Tavern Bond.

A surety on the bond of tavern keepers cannot be prosecuted under an indictment alleging an "offense of a breach of tavern bond." A surety is not subject to indictment; he can only be proceeded against under a civil action. 543

Selling liquor to minor, without written order of parent or guardian, is a personal offense by the seller,—vol. 1, 624.

Landlord not liable unless he knew of, authorized, or assented to it,—*Ib.*

Where landlord has no knowledge that gaming is going on in his tavern, he is not criminally responsible,—vol. 1, 181.

CRIMINAL LAW—Continued.

Tippling House—License Transferred.

Garriot having obtained a license to retail spirituous liquors in a certain house and not choosing to exercise the privilege himself gave it to the appellee, who was indicted for retailing under that license. Held that the appellee had not violated the law against retailing spirituous liquor without a license. 136

Subordinate officer not liable criminally for taking property in obedience of command of superior officer,—vol. 1, 406.

CROSS APPEAL.

As to transfer of goods by conveyance, binding on vendor, no complaint can be made by cross appeal of that not injurious to such party,—vol. 1, 395.

CROPS.

Contract—Wife's Right to Lease Estate of Deceased Husband.

A contract between a tenant and the wife of a deceased land owner, for the cultivation and making of a crop for the ensuing year, is binding as to the administrator of the estate, who had knowledge of the existence thereof. And she is not held accountable for the products of same, unless it be for such amount as above her dower, not then assigned her, and for her yearly support, and such improvements and repairs necessary to make the crop. 416

CROSS PETITION.

Executory Contracts—Pleadings.

A transfer of an expectancy by heirs of an estate must be alleged by cross petition, in a suit by the holders of these equities to enforce same as against one of the legatees, it being a contest between equities as to which litigant is entitled to the legal title. 354

Subsequent Purchases—Rescission.

A contract will be rescinded on cross-petition of a vendee, who has subsequently purchased a part of the land from the party who is seeking to rescind the contract of his purchase, on the ground of fraudulent statements made to him, where he has represented to his vendee that the statement he complains of were true. 35

Pleadings—Amended Cross-Petition, Offer to File.

Allegations of fraud, in a cross-petition, and of the payment of a portion of the mortgage, in litigation, uncontroverted in that there was a mere motion to reject the filing of same, which was sustained, presented a prima facie case for relief, and it was error for the court to reject the amended cross-petition as offered. 263

Discontinuance of original suit, operates as a discontinuance of cross-petition against co-defendant,—vol. 1, 203.

Jurisdiction over Cross-Petition—Pleading.

Properly filing in the Circuit Court a petition for injunction and rescission, gave to the court jurisdiction over a cross-petition, for a specific execution and an enforcement of the lien sought to be enjoined. 498

Before a judgment can be rendered on an answer, it must be made a cross-petition,—vol. 1, 203.

Vendor's Lien—Answer Must be Made a Cross-Petition.

Gudgell had obtained a judgment at law against Rutherford and filed an answer to the attachment suit asserting a vendor's lien, but he failed to make his answer a cross-petition against Rutherford, nor in any manner made him a party. Held, that the entry of Rutherford's appearance did not make him a party to Gudgell's answer. 161

Pleadings—Demurrer.

Where a defendant has a cause of action against a co-defendant, or a person not a party to the action, and affecting the subject matter of

CROSS PETITION—Continued.

the action, he may make his answer a cross-petition against a co-defendant, or such other person, and such cross-petition is not demurrable. 454

Pleading.

Where a cross-petition and counter-claim depend on the facts stated in the answer to original petition, held that those facts showing imposture and entire want of title either legal or equitable, are admitted by the failure to respond to the allegations specifically, as required by the Code. 664

Summons.

Where a party is made defendant to the original action by amended pleadings, process on his cross-petition against the plaintiff is not necessary. 71

Answer by Defendants—Waiver of Right to Question its Legal Form.

An answer as to its merits to a cross-petition, (that sets up a cause of action), by the defendants, without having demurred or moved to dismiss same, is held to be a waiver of any subsequent right to do so. It must be treated as part of the whole suit. 354

Warning order against a defendant, in a petition to which he was not a party, does not apply to a cross-petition, he not being before the court,—vol. 1, 82.

CUSTOMS AND USAGES.

Contract—Rule of Law Changed by Custom and Usage.

The rule of law in relation to contracts, may be changed by usage of trade and custom in particular localities. But before a custom can become a law, it must appear that the usage has been general and uniform, and the custom peaceably acquiesced in and not subject to contention and dispute. 389

Special Customs—Contracts.

Special customs so often create confusion of legal rules in directions not contemplated in their adoption, they are to be admitted into the law with great reluctance; and it cannot often be a hardship to parties to reject a custom, so long as they are left free to make their own bargains, and can if they are disposed to do so, incorporate the custom into their contract, as a part thereof. 390

Custom Must be Certain and Reasonable.

To make a custom and usage a bona fide one, it is a pre-requisite that the custom was certain and that it was a reasonable one. And of the latter, where parties would charter a steamboat, they could purchase articles to transport on it more valuable than the boat itself, and if it should be liable for the price, the property of the owner could be incumbered and put to hazard, by the reckless conduct of an insolvent bailee. 390

Statutes—Lien on Steamboats—Contracts by Usage and Custom.

A statute giving a lien on steamboats for certain specific debts, will operate to destroy any local custom by which liens were asserted for debts and liabilities not enumerated in the statute. Certain specific creditors have by a special statute, liens on steamboats for their debts, and for other debts of their owners they may be seized and sold under the general law on the subject; and a custom of a particular place which would secure to creditors of the actual owners of steamboats preferred liens on such boats for the price of produce, or other articles sold to said owners to be transported by freight, or to earn freight, might be reasonable and just, while to make them liable by special lien, or otherwise for the debts of persons not the owners, would be altogether unreasonable. 389

Pleadings—Allegations of Petition—Customs and Usages—Uniformity a First Requisite to Constitute.

Uniformity being the first requisite in the establishment of law by custom, a petition that alleges in substance that, in the case of furnishing a

CUSTOMS AND USAGES—Continued.

steamboat with goods and supplies for speculation by parties thereto, or to produce freight for the boat, that in all such cases steamboat men, merchants and others at Paducah, Ky., and up the Tennessee river, regard the boat liable for such debts, and that it has been so long acquiesced in that it has become a well established usage, and that it is a valid custom is held not sufficient to establish that the custom was uniform and general. 390

Stock Brokers—Specific Contract—Custom and Usage Among Brokers.

Where in the pleadings, there is a conflict as to the terms of a contract between stock brokers, and no evidence tending to establish the agreement, the court will assume the contract to be according to the custom and usage between brokers and their customers in relation to transactions of a like character. 499

DAMAGES.

Contract for Sale of Land—Rescission—Damages for Breach—Rent.

Upon rescission of a contract for sale of land, damages resulting to the vendee by reason of the failure of the vendor to carry out an agreed rescission between the parties, will be allowed the vendee, it appearing that he vacated the premises at vendor's demand some three months prior to the settlement of the vendor, for which time the vendee would be entitled to his rental of the premises. 215

Rents—Damages for Non-Performance of Contract.

Under a contract between landlord and tenant, to cultivate a farm and profits to be yearly divided, the landlord is not entitled to charge for rents of the farm. If the tenant fails to perform his contract, the landlord is entitled to damages, but a reasonable rent of the land, would not be a criterion therefor. 530

Rent—Failure to Take Premises—Criterion of Damages—Burden of Proof.

The price for which property was rented, under a contract, is prima facie the value of the use of the property, and the burden of proof is on defendants to show that they could only get for it the amount reported as received by them 329

Injunction.

Damages upon dissolution of an injunction,—vol. 1, 399.

Judgment—Damages—Assessed by Jury—Justice Court—Trespass.

In an action for trespass, before a justice of the peace, a failure to have the damages assessed by a jury will not make the judgment void, but voidable only. 569

Judgment—Action on Bond—Assessment of Damages.

In an action, founded on bonds of defendants to perform the judgment exhibited and the amount sought to be recovered was specifically stated in accordance with the judgment, the defendants failing to answer, the court is authorized to render a judgment without a jury to assess damages...663

Damages, where constable fails to return execution, within 30 days,—vol. 1, 543-38-611.

As to amount of damages on failure to turn over money collected by constable on an execution, after demand,—vol. 1, 543.

Same—This proceeding not restricted to court of original jurisdiction.—Ib.

Actions—Failure to Prosecute Suit—Sufficient Evidence—Breach of Bond.

In an action in equity on the bond of the plaintiff in a replevin suit for his failure to prosecute same, the loss the defendant therein might have sustained for a breach of the bond was a subject of proof, and he must show that he had been deprived of his property, and the extent of the loss therefrom by proving the value of the property replevied. A mere judgment for the face of the bond, for alleged breach, is not sufficient. 409

Consignee only liable for amount received for goods damaged in transit, and not for damages sustained,—vol. 1, 490.

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Right to recover, for loss by reason of superior title, from vendor, in a suit to enforce purchase money lien,—vol. 1, 529.

DEBT, ACTION OF.**Express Acknowledgment of the Debt.**

In order to take a case out of the statute of limitations an express acknowledgment of the debt, as a debt due at that time (coupled with the original consideration), or an express promise to pay it, must be proved to have been made within the time prescribed by the statute. 601

DEBTOR AND CREDITOR.**Debts Purchased by Agent—Participation in Fraud—Equity Will Not Relieve.**

Equity will not relieve a debtor from the payment of debts purchased by his agent, where he has participated in the fraud committed on his creditors by his agent. 26

Debtor's Right to Maintain Family.

It is a well settled principle that a creditor has no enforceable claim on the capacity or personal service of an insolvent debtor and the law will permit him to appropriate the products of his industry and skill to the maintenance of his family. 101

But as indulgent as the law is, it will not permit a debtor, after acquiring property by his skill, industry or credit, to secure to himself an estate by making his family the depository of the title for the purpose of defeating his creditors. 101

Deeds.

Property held by unrecorded deeds, not leviable without consent of debtor,—vol. 1, 311.

Same—Refusal of debtor to surrender,—Ib.

Purchase of debts, by debtor, upon representations of solvency, fraud on creditors,—vol. 1, 303.

Insolvent Debtor Doing Business in His Wife's Name—System of Bankruptcy.

If an adventurer in trade may, on becoming insolvent, drop his own name and assume that of his wife as the head of a business and thereby become rich and yet defy his creditors, a more convenient system of bankruptcy could not be conceived, and such acts cannot be tolerated by the courts..101

Executions—Failure to Return—Insolvency of Debtor no Excuse—Penalty.

The fact that an execution debtor is insolvent, will absolve an officer from liability for the debt, but it cannot relieve him from the penalty for failure to return the execution. 27

Sufficient Notice to Execution Debtor.

Notice to an execution debtor, of a discharge of a levy, without a bond of indemnity, given at 12 o'clock on the day of sale, held insufficient..622

Trusts—Rights of Redemption of Trust Property—Sales.

A sale of mortgaged property with a right of redemption by the mortgagor being given by the purchaser, the property being of a value of \$2,000 and sold for \$179.08, and the mortgagor continuing in possession without a definite contract as to rent or future surrender, is held not to be a sale absolute, but in trust for the creditors of the mortgagor....535

Principal and Surety—Agreement for Delay Between the Principal debtor—Release of Surety.

An agreement for delay between the principal debtor and creditor, will not exonerate the surety, unless it be a binding agreement, founded on a sufficient consideration, which may be enforced to the detriment of the surety by suspending the right of action and thereby obstructing his legal or equitable rights. 495

DECEDENT HEIRS.

Provisions of section 569, C. C., apply to such representatives as are personal to decedent heirs, but not to heirs who represent their own interest,—vol. 1, 602.

DECLARATIONS.

Bills and Notes—Waiver of Claim for Set-off—Assignment—Declaration in Presence of Purchasers.

Where the maker of a note is present when a transfer thereof is made from one holder to another, and offers no objections thereto, but says that the note is good and offers to settle it by delivery to the holder of other collateral therefor, he will be considered as having waived any claims, demands, or off-sets he may have to the note. 284

DECRETAL SALE.

Resale—Vested Rights.

When real estate has been regularly and fairly sold at a fair price, the first bidder, having no vested rights before confirmation, cannot complain at a second sale, at which another bids more than he is willing to give..459

Extorting Money by Threatening to Open Bidding—Fraudulent Representation.

At a decretal sale in the city of Louisville where the land was sold to George W. Bayless, for \$9,175, whereupon one Arthur Peter threatened that unless he was paid \$500 by Bayless he would reopen the sale and bid in the property, and the amount was paid him. This petition was filed by the heirs for whom the sale was made, to cancel same on the ground of a fraudulent combination between Bayless and Peter to keep others from bidding on the property. While the Appellate Court would rebuke the dishonorable practice of extorting money by threatening to open bidding, unless the parties to the sale were injured by his conduct, the sale should not be set aside merely to punish them. 405

Ostensible and Real Bidders—Parties.

Alcorn and Givens having purchased a farm at decretal sale, executed the bond for the purchase price with D. H. Walker as security. Before this sale was confirmed, they sold the land to Montgomery and delivered to him a title bond, reciting that A. Alcorn, R. H. Givens and D. H. Walker were the parties of the first part. The notes taken for the purchase price were made payable to said Alcorn, Givens and Walker. Held, that Alcorn and Givens, by their own acts in giving the bond and receiving said notes furnished strong evidence that Walker was interested and his interest *prima facie* appearing, his heirs should have been made parties to the suit to foreclose. 313

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A deed contained the following provision: "Said vendors reserve for their use, etc., a sufficiency of said land, for their support and maintenance during their lives." Arbitrators having been appointed, some 30 acres were set aside for use of the Royse and wife. At his death, the wife entered into an agreement with Blair, the purchaser, "conditioned that when the surplus on hand, etc., shall be used by me as a support, etc., that he will on request of me, or my agent, lay off a sufficiency of land according to the arbitration bond now filed in Milton Howe's office, according to the requirements of said bond." Whereupon she surrendered to Blair the land. Held, that in the absence of the filing of said bond or proof, and no provision being made for the support of the wife, it was without consideration for the surrender of the land. 528

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Exceptions to Depositions—Appeal and Error.

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Where a note has passed into the hands of one of the distributees as his share of the estate, and the distributee is induced to accept a renewal, and to receipt the administrator in full settlement, the estate being closed, they cannot then set up a claim for usury, except for that part as would have fallen to the distributee as his share of such loss based on a pro rata distribution. 616

A right they had, while the note was in the hands of the administrator, was waived by inducing the distributee to take the new note, except so far as his individual interest therein was concerned. 616

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Personal Property—Remainders—Rights of Distributees.

Extenuating circumstances, as to the forfeiture of the whole price received from the sale by a legatee, where there is a remainder interest, in the property, may arise so as not to deprive him of that part of the use of which would have enured to his benefit. 614

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An unacknowledged deed by husband and wife will pass title of husband as tenant by the courtesy of deceased wife,—vol. 1, 65.

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A remainder interest in a life estate is subject to sale under an execution, and an absolute deed therefor may be made. 526
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The father of the remaindermen, having purchased their interest at execution sale his note, given therefor, is subject to be paid out of the deceased estate. But this will not affect the life estate of the wife in the land and she cannot be estopped from asserting her tenancy to the tract.526

Life Estate—Residuary Legatees.

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Personal use of lands devised for life, upon the death of devisee, without issue, estate descends to brothers and sisters,—vol. 1, 464.

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A devisee under a will to the wife that she should have the sole control of every specie of the estate, to give to whom and when she pleases, during her natural life, and after her decease, every specie of property that could be found to be equally divided between the children, is held not to vest the wife with the fee simple title thereto, that she may dispose of the estate to one of the heirs to the exclusion of all others. 418

Wills—Construction of—Word "Child or Children" Used in Devise.

A will contained the following clause, "I give and bequeath to my son Edmund S. Lampton eight acres of land x x x And if said Edmund shall die without lawful issue, it is my will and desire, and I do hereby direct, that the estate herein devised to him shall go to his sisters in equal proportion, and if either or both of them be dead, to the child or children of such dead sister, the children taking the share of the dead parent." Held, to mean that grandchildren of either of said devisees, would not participate in the distribution of the estate of said Lampton, at his death without issue, but would descend to the children only. 480

Construction of Will—Right of Devisees to Sell Lands Under a Special Legacy.

An action was brought against the vendee of several legatees charging the void sale of lands devised under the following clauses in the will of the intestate: After disposing of the lands in controversy, the sixth clause of the will reads: "Should the children think best to keep the property together and improve it to their mutual benefit in peace, law and harmony, I clothe them with full power and authority to do so; but in case of marriage, dissatisfaction or removal, they may consider each other's interest and divide, sell, deed and convey in such manner as to benefit them all and as seemeth to them best and most conducive to their happiness," and followed by a second clause reading: "Should any of my children die without a living heir of their body, then and in that case the property and proceeds which I have devised to them is to be revested in the last named children." Held, that sales of their respective interests by the devisees after they became twenty-one years of age, though they may have since died without issue, were authorized by the will, giving effect to the second clause and, as far as practicable, to render the different provisions of the will harmonious and consistent with each other. 167

Wills, Construction of—Reversionary Estate—Legacy.

A testator bequeaths to his several children certain legacies to be held in trust for their use and "in case of their death without children or heirs of their body, it shall revert back to the estate, etc." Held, that upon the death of one of said legatees, under age and childless, her pro rata as bequeathed, would fall back to the estate of the testator, and pass to his heirs and distributees, free from any trust whatever. 148

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That part of the bequests to the deceased's inheritance which had no saving clause of reversion, would not reinvest in the estate of the testator, but would pass to the heirs and distributees of the deceased heir. 148

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A surety, whose duty it is to see that the debt of his principal is discharged, may proceed immediately against his principal, or be subrogated to the rights of the creditor. It is only when the creditor and principal, without the privity and consent of the surety, make a binding, valid agreement, change the terms of the original undertaking, and increase the risk of the surety, that he will be discharged. 365

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The acquiescence of one partner in acts by the other, which conduced to prove a dissolution of a former partnership, will bar any recovery of a share of profits made in all transactions subsequent to the alleged dissolution 486

Discontinuance of original action, operates to discontinue a cross-petition in the same suit,—vol. 1, 252.

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Voluntary discontinuance of action by plaintiff, on appeal to circuit court,—vol. 1, 2:13.

DISORDERLY HOUSE.

Indictment for Permitting—Words and Phrases.

An indictment against a defendant for keeping a disorderly house was rendered. At the trial the jury were instructed "that if the defendant did then and there in any house, or any premises in his possession or under his control, suffer any men and women, etc." Held, that the use of the word "suffer" was in place of permit or consent, and was not misleading to the jury. 251

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Land Susceptible of Division.

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Abandonment for One Year—Weight of Evidence.

Where the weight of the evidence shows an abandonment of the wife by the husband for one year before the commencement of an action for divorce, it is sufficient to entitle the wife to the relief sought. 408

Habitual drunkenness, and failure to provide for wife, held sufficient for divorce,—vol. 1, 83-84.

Attorney and Client—Excessive Fee in Divorce Proceedings.

Though the evidence may show the services of the attorneys for the wife, in divorce proceedings, to be worth \$300, in the absence of evidence as to the ability of the husband to make such payment in that the estate is not ample, the court will not reverse the court below for an allowance of only \$150. 633

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Covenant—Separation.

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Notice of an application for maintenance is not required, where there is a personal service of the summons. 332

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An allowance for deficiency from husbands estate, under Sec. 6, Ar. 3, Ch. 47, 2, Rev. St., must be made on equitable terms,—Ib.

Pendente Lite Allowance for Maintenance.

An order of court for payment of \$300 to the wife for her maintenance in an action for a divorce, a vinculo, held not to be excessive, but necessary and proper by the action of the plaintiff in prosecuting his suit. ...533

A Mensa Et Thoro.

A divorce, a mensa et thoro, where the proof shows that though for some years her husband had been habitually drunk and had treated her cruelly, yet, within the statutory period of five years before institution of her suit, his intemperance was only occasionally and unaccompanied

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by maltreatment, neglect or essential waste, and had attempted a reconciliation and restitution of conjugal rights, is held to be all that the evidence justifies. 599

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Under Sec. 32, Chap. 25, Rev. Stat. requiring the husband to pay all costs of a divorce suit, where the wife is not in fault, held, that though the lower court granted the relief of the plaintiff, for which a reversal could not be had costs were properly adjudged against him on the evidence, the wife proving their separation to be only temporary. 633

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Choses in Action—Pass by Donation.

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Contract of Sale—Personal Property—Binding Consideration.

A purchaser of personal property in which there is a remainder life interest to others, known to him at the time, though the sale be attempted absolute with general warranty, is held to be estopped from denying liability on a note given for the purchase price, his purchase of the life estate being held to be a binding consideration. 596

Sale of Property—Power of Attorney.

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A note, on which the original petition was filed, having been excluded on the plea that it was void for want of a revenue stamp; held that appellant was estopped from objecting to an amended petition on the oral contract, for which the note was given. 186

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Principal and Agent—Competency of Agent as Witness.

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A deed acknowledged and lodged for record the day it bears date is constructive notice to the whole world, in whom the legal title is vested; the possession of real estate does not raise a presumption of ownership against the recorded title, nor is it ever a badge of fraud against the legal title as to future debts. 114

Purchase of Property in Name of One for Benefit of Another.

Taylor purchased of Montgomery land, for which he executed his notes. A part payment was made of \$85 by delivery to Montgomery of a horse belonging to Land, and afterward Land moved on, the property. Other payments were made, by Taylor borrowing money from other parties and executing his note therefor. Taylor and Land both claimed the purchase made for Land. Held, that the property would be liable for the debts of Taylor. 522

Sales—Failure of Consideration—Fraud.

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Preference of Creditors—Subrogation—Innocent Purchaser—Purchaser with Notice.

One who purchases property of an insolvent debtor, whose precarious condition was known to him at the time, will be deemed to hold the property in trust for the creditors generally. The payment of part of the purchase money, on the order of the debtor, to a third party, will only give the purchaser a right to be substituted therefor, but he cannot claim a lien for such an amount so paid, over the creditors. 424

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Land—Gift of—Future Recognition—Dower.

The father bought a tract of land and directed the vendor to convey it to his daughter. A few hours before the father's death he called on the grantor to remember his promise to the daughter. No deed or writing having been made between the parties. Held, that a direction to convey to the daughter and future recognition of the gift by her father, must be

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regarded as a gift of either the money or land to her. The title never being in the father, either equitable or legal, the widow is not entitled to dower. 453

Deed of Gift—Mortgage—Infant's Contract Void—Fraudulent Conveyance.

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A warehouse man, in the absence of any direct instructions, by the consignor, may exercise his own discretion and in cases of unforeseen emergency may act contrary to general instruction, provided he acts in good faith..375

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Street Improvement—Contract with City—Ordinance—Curbing no Part of Contract—Abutting Land Owners—Lien.

Curbing is not included in grading and paving and is as distinct as these are from each other and unless the ordinance authorizes the curbing the city has no right to put it under contract, but if it is done the city and not the lot owners are responsible. 75

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An account against a guardian, though the evidence conduces to prove a part of same was not just, where the guardian admits the whole amount to be due, and himself became a witness to prove it, will be enforced by a judgment of the court, as against a third party. 535

Bond—Construction of Its Sufficiency—Release of Surety—Right of Wards to Sue Guardian or One or More of the Sureties.

A bond that does not show the name of the guardian, ward or surety, though signed by guardian and his surety, is held not to be a sufficient

GUARDIAN AND WARD—Continued.

bond as is required by statute, or sufficient as an indemnity to a former surety who makes demand for new security, and will therefore not release the former surety. The wards have the right to sue the guardian alone, or with one or more of his sureties, and a judgment against one of such sureties, he cannot reverse because the other sureties were not made parties to the suit. 202

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Purchase of Personal Property by Wards to Account of Guardian .

Where minors, purchase at a judicial sale, personal property, of the estate of which they are heirs and take possession of and use the same, continually, their guardian should be credited against an estate under his control with the amount bid by the wards. Or upon an adjustment of accounts said property should be turned in to the hands of the guardian..490

Duty of Guardian to Make Proper Report.

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Fund belonging to Ward Which Pass into Husband's Hands—Legal Rights of Ward.

Though the statute provides that upon the marriage of an executrix or administratrix, her fiducial powers shall cease, this provision does not exist as to female guardians, and funds belonging to her ward, which may pass into her husband's hands, pass as fiduciaries and not merely as borrower. 298

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It is reversible error, not to appoint a guardian ad litem for an infant,—vol. 1, 152.

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Ancestors' Debts—Liability—Heirs and Distributees.

The defendants are liable, either as heirs, distributees or trustees to pay the debt of their father, they having received from him a sufficiency to satisfy it. As he seems to have distributed all his estate among his children, it cannot be regarded as an advancement. 262

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Abandonment of Public Road.

The close proximity of a public road, constantly used, to one beneficial only to a few nearby private individuals, where it is shown that there is not sufficient labor, to keep in repair both, will justify the abandonment of the lesser used road by order of the court. 484

HOMESTEAD.

Dower—Right to Collect on Mansion House Until Dower Assigned.

Though the rents from a deceased's estate, including the mansion house, may amount to more than the wife's one-third of the rental value of the whole estate, she cannot be deprived of the rents to her exclusively from the mansion house, since she is entitled to hold that and curtilage without charge until her dower may be assigned her. 510

HUSBAND AND WIFE.

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The written consent of the husband to the use of the wife's property, made at the date of marriage, and attached to and recorded with the wife's will, held to be an ante-nuptial contract. 406

Contract Between Husband and Wife—Use of Wife's Property—Express Contract.

Under a written agreement between husband and wife, that she retained the right to hire out her personal property or keep same as she may think proper, should she decide to keep same for the family use, the law will imply no contract on the part of the husband to pay hire during their joint lives. 466

Contract—Wife's Right to Lease Estate of Deceased Husband—Crops.

A contract between a tenant and the wife of a deceased land owner, for the cultivation and making of a crop for the ensuing year, is binding as to the administrator of the estate, who had knowledge of the existence thereof. And she is not held accountable for the products of same, unless it be for such amount as above her dower, not then assigned her, and for her yearly support, and such improvements and repairs necessary to make the crop. 416

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Dower—Descent and Distribution.

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Dower—Renunciation by Wife.

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Where the husband holds only an equity in land, the wife has no dower interest,—vol. 1, 96.

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HUSBAND AND WIFE—Continued.

Exempt Property—Right of Husband to Convey Same for Use of Wife.

Property that is exempt from liability for the debts of the husband can be conveyed in trust for the use of the wife, and a subsequent attempt to create a lien upon same by the husband would not affect the title he had already conveyed. 286

Fraudulent Conveyance—Creditors.

Upon dissolution of a partnership, the partners conveyed lands they owned to the wife of one of the partners in consideration of her assumption of two debts they owed. This conveyance was attacked by creditors as fraudulent. The wife claimed as part consideration a payment of \$500 she had invested in the business. Held, that the land must be considered as liable to the debts of the insolvent husbands, and subject to the rights of creditors. 319

Funds Belonging to Ward of Female Guardian, Which Pass into Husband's Hands.

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Improvement on Wife's Property.

The husband may put such improvements on his wife's property as will make it reasonably fit for occupancy by himself and family without such improvements being subject to his debts. 158

Use of Wife's Property—Interest.

As the husband has the joint use of the wife's property during their lives his estate is chargeable with interest on the use of personal property of the wife after his death, only. 644

Landlord and Tenant—Discharge of Liability by Payment by Tenant to Husband—Death of Husband. Power of Husband over Wife's Estate—Rent Collected by Husband.

Though under the revised Statutes, the husband cannot sell his wife's land, nor can they be sold for his debts; he has only the use of them; when they are leased by the husband for a period not greater than three years and he receives the rent therefor, such payment would discharge the tenant from all liability to pay it again to the wife, or any one else, in case of death of the husband. 290

Assignee of Rent Note.

As to the residue of rent, evidenced by a note to the husband, the wife is entitled to the same. Even though the note be not assigned by the husband and should, at his death, pass to his personal representative, he could not have collected it because, upon the death of the husband, the wife became entitled to the uncollected rent and the assignee of the note took it subject to that contingency. 290

Lands Purchased by Wife—Erroneous Conveyance to Husband.

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Lands—Purchase for Husband and Wife—Estoppel.

Where funds are placed in the hands of a third party by a husband, with which to purchase a home for himself and wife, and afterwards is present and does not object to the conveyance being put in the wife's name, he will be estopped from claiming an improper use of the money and recovery thereof. 538

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A sale held without consideration, where wife's land conveyed to husband's father, and reconveyed to the husband,—vol. 1, 258.

HUSBAND AND WIFE—Continued.

Lien—Prior to Widow's Claim as Devisee.

The unpaid purchase money on land is prior to a widow's interest in her husband's real estate as devisee. 385

Sale Free from Widow's Dower.

A court of equity may properly sell so much of a decedent's land as is necessary to pay the purchase money due, free from the widow's dower. 385

Creditors Suit—Lien Created by Payment by Wife.

In a suit by a creditor to subject the lands in the name of the wife, conveyed to her by her insolvent husband, it is held that the wife will have a prior lien thereon for moneys she paid for the land out of her individual means. 488

Use of Property by Husband After Wife's Death.

The retention and use of the personal property of the wife, by the husband, after her death, will imply a promise to make a reasonable compensation therefor. 467

Separate Property—Chattels—Equitable Doctrine—Fraud on Creditors.

The separate property of the wife would by law vest in the husband, yet if he does not so regard it, but recognizes it as belonging to the wife exclusively, such property would not vest in him, this however not to be made the instrument of defrauding creditors. 440

Wife's Separate Estate for Life—Remainder to Children Held in Trust—Mortgage with Consent of Donor.

The husband bought and paid for land and had the legal title conveyed to himself in trust for the separate use of his wife and of her children during life and after her death the remainder for said children: Held, that the husband was not only trustee but donor of the trust, and had a legal right in conjunction with his wife to sell or mortgage her interest for her support. 460

Settlement must be made wife for her support out of property invested in lands in name of husband, before payment to creditors of husband,—vol. 1, 611.

Same, where wife's equity is held equal to that of her husbands creditors,—vol. 1, 580.

Voluntary Conveyance—Void as to Subsisting Debts.

A subsisting debt, founded on a valuable consideration, is held to be sufficient to authorize the cancellation of a deed from a husband to wife, made after the creation of the debt. 471

Wife cannot recover funds voluntarily applied on her husbands debts, realized out of her heritage from her fathers estate,—vol. 1, 593.

Wife is estopped from claiming proceeds of her heritage where she had consented to it being applied to her husbands debts,—vol. 1, 593-160.

IDEM SONANS.

Evidence—Proof of Interested Witness Being Signer of Attachment Bond Coincident of Names—Witness.

The mere coincidence of names will not authorize the conclusion that they represent the same person. Proof must be had, that a witness whose testimony was used in the court below, was the same person as the one whose name appeared to the attachment bond, in order to exclude him as a witness, on the ground of being an interested party to the suit. 444

IMPLIED TRUST.

Purchaser from Trustee, with Notice, takes Property Subject to Trust.

Where land is affected by an implied trust, the purchaser, with notice takes the property effected thereby, and is substituted for the Cestui Que Trust. 188

Express Trust.

It is shown that a father, for a grossly inadequate consideration, transferred to two of his sons, large tracts of land, on assurances from

IMPLIED TRUST—Continued.

them, that it would protect him from a possible judgment and loss on a bond then outstanding, and also that the lands should be held by them for all the children, also that the payment of the consideration was denied by witnesses. It was held in the names of the sons for some eighteen years. In a suit by all the heirs, held to be both an express and implied trust. 560

IMPLICATION.

Finding of one in the depot of a Railroad Company, seeming to be in charge, is held, to be an implied authority to transact business for Company,—vol. 1, 133.

IMPRESSMENT.

Confiscation Laws—Forfeiture of Property—Illegal Order of Superior.

The right of impressment is justified only by emergencies and a citizen's property cannot be taken without proof of forfeiture. Where no justification is made out, subordinate officers are responsible for executing illegal orders of their superiors, and are trespassers. 456

IMPROVEMENTS.

Improvement on Wife's Property.

The husband may put such improvements on his wife's property as will make it reasonably fit for occupancy by himself and family without such improvements being subject to his debts. 158

Tenancy—Lands—Permanent Improvements.

Under a lease or tenancy by permission, fencing, grubbing, ditching and clearing lands are not permanent improvements, as all these things are necessary to be done to enlarge the products of the farm and increase the profits of the tenant, but improvements to buildings and the making of a cistern are of a permanent character and the owner is liable therefor. 265

Contracts—Lease—Forfeiture—Non-Payment of Rent.

Where by the terms of a lease it is stipulated that the lessor may re-enter, upon the failure to pay rent, the lessor may annul the contract and is entitled to the possession. 91

Written Contract—Loss of Improvements.

The lessee having failed to execute the written contract for the rent of the premises the lessor was entitled to recover the possession. But as such recovery would involve the loss of the improvement the lessee may elect to execute the writing or submit to eviction. 91

INDICTMENT.

Criminal Law—Offence of a Breach of Tavern Bond.

A surety on the bond of tavern keepers cannot be prosecuted under an indictment alleging an "offence of a breach of tavern bond." A surety is not subject to indictment; he can only be proceeded against under a civil action. 543

As to proper and essential averments in an indictment for betting on an election, vol. 1, 243.

Description in indictment of written instrument not required when withheld or destroyed by act of defendant, but indictment must aver that fact,—vol. 1, 345.

An indictment is sufficient if specifically appraise the defendant of the particular charge against him,—vol. 1, 408-345.

An indictment presented to the court, in the presence of the grand jury, with an order to that effect, held, sufficient compliance with Code,—vol. 1, 39.

An indictment charging the setting up, promoting and managing a lottery for money, held sufficient,—vol. 1, 585.

As to sufficiency of an indictment to constitute robbery, see,—vol. 1, 132.

An indictment for passing and vending counterfeit national bank notes, held sufficient, where it gives the denomination, bank and to whom passed,—vol. 1, 531.

INFANTS.

It is the duty of the court in exercising general supervision over rights of infants, to have them brought in as parties to an action,—vol. 1, 509.

A decree against infants, without first appointment of guardian ad litem to defend, is void,—vol. 1, 58-152-130.

No one but an infant can take advantage of the error in not appointing a guardian ad litem,—vol. 1, 152.

Though not liable on written promise to pay for necessities furnished, yet a real or implied promise may be enforced, in an action against infant,—vol. 1, 536.

Infant owners right to allotment of interest in legacy,—vol. 1, 217.

Though a sale of an infants land is voidable by his heirs, neither the infant nor his heirs, could repudiate the sale without restitution,—vol. 1, 250.

Deed of Gift—Mortgage—Infant's Contracts Void—Fraudulent Conveyance.

On the 16th day of May, 1865, Mary Price made a voluntary deed of gift to her infant daughter, Florida Price, of various articles of household furniture and the deed was duly recorded. Afterwards, the mother and daughter executed their joint note with a mortgage on the furniture to secure its payment. Held, that as the record discloses no evidence of actual fraud in the execution of the deed of gift, and as it was made before the debt of appellee existed, it therefore operated to vest the title to the property in the infant and she had a right to avoid the note and mortgage on the grounds of her infancy. 315

Negligence—Personal Injury—Careless Driving on Streets.

E. Roberts, while driving rapidly through the streets of Louisville, ran over, and materially injured a child of some four years of age. The accident occurred at the curbing, where the child was seen to be trying to get up, when the buggy of Roberts ran over it. His attention was called to the child being ahead of him and in the street, but did not slow up or turn his horse so as to avoid the wheels of the buggy running up against the curbing, at the point where the child was seen to be clamoring up: Held to be contributory negligence by Roberts, and liable for personal damages sustained by the infant. 272

Mode and Time of Sale—Discretion of the Court—Consent of Infants.

No other law than the deed of trust and the sound discretion of the court prescribes the mode or time of sale. The court has the power to make a sale without the consent of the infant beneficiaries. 90

Service of Summons On.

Where the defendant is an infant under the age of 14 years, the service must be on him and his father or guardian if to be found, if not then upon his mother or any other person having the care or control of him. When the infant is over 14 years it must be served on him. 85

Purchase of Personal Property by Wards Credited to Account of Guardian.

Where minors, purchase at a judicial sale, personal property, of the estate of which they are heirs and take possession of and use the same, continually, their guardian should be credited against an estate under his control with the amount bid by the wards. Or upon an adjustment of accounts said property should be turned into the hands of the guardian. 490

INFRINGEMENT.

A petition that fails to allege the defendant had upon any of their labels or wrappers the name of the plaintiff, or that the articles they sold were manufactured by the defendant, would not constitute an infringement,—vol. 1, 352.

INHIBITION.

A legatee is not prohibited from assigning his legacy to his mother, after he becomes 21 years of age, the amount of the legacy not having been paid him up to the time of assignment,—vol. 1, 482.

INHIBITION—Continued.

A legacy in a will, payable to minors as they become of age, creates a fee simple estate at that time, and may be disposed of in any manner desired by the legatee,—vol. 1, 462.

INJUNCTION.

When not Maintainable.

Injunction is not maintainable to withhold enforcement of a judgment obtained by default, after process duly served, and the suit ignored by defendant. 506

An injunction not maintainable against use of patent right, by one partner, where no sale or agreement had been made between the parties, though one partner had withdrawn from the firm,—vol. 1, 309.

Jurisdiction—Dissolving of an Injunction Without Final Judgment—Appeal and Error.

The Court of Appeals jurisdiction extends only to the final orders and judgments of inferior courts and cannot assume jurisdiction of an order dissolving an injunction without a final judgment in the action. 170

Dissolution—Conversion of Property Under—Liability on Bond.

On the dissolution of an injunction, personal property can be surrendered by the plaintiff to the defendant; the detention could not be treated as a conversion of them by the plaintiff, he being liable on his bond in consequence of the injunction, to the defendant for any damages sustained by him. 279

Reversal of Judgment—Effect to Dissolve.

The judgment of the Court of Appeals reversing a judgment perpetuating an injunction and remanding the case for only an assessment, etc., had the legal effect to dissolve the injunction. 93

Dissolution of an injunction on a petition for a new trial cannot be revived by the Appellate Court until appellant shall have obtained an order from the court below to stay the dissolution for such time as to enable him to obtain an order from the Appellate Court to reinstate same,—vol. 1, 623.

Damages.

Where it appears from the records, that defendant is not restrained from proceeding against plaintiff on an order for an injunction, damages will not be awarded,—vol. 1, 399.

Right by injunction to prevent a collection by execution, as far as payments had been made,—vol. 1, 244.

Injunction in Quarterly Court against collection of purchase money note, on account of failure of title,—vol. 1, 253.

INNOCENT PURCHASERS.

Where a father by parol gave land to his son, who transferred same to other parties, and ten years thereafter, the father deeded same to his wife and children, held that they were not innocent purchasers for value,—vol. 1, 276.

INSOLVENCY.

As to mortgage, not made in contemplation of insolvency, etc,—vol. 1, 13.

Sale, mortgage or lien to secure one creditor to the exclusion of other, in contemplation of insolvency,—vol. 1, 50.

Insolvency one of the essential facts necessary to exist before a sale by a debtor will operate as an assignment,—vol. 1, 392.

One who is insolvent cannot buy in his debts at a greatly reduced price, on false representations,—vol. 1, 303.

Promissory Note—Assignment—Diligence.

The failure to issue an execution for ten days after it might have been done, is such want of diligence as will exonerate the assignor; and the

INSOLVENCY—Continued.

proof of insolvency, when the execution was delivered to the sheriff, cannot dispense with diligence in issuing it. 302

Execution—Failure to Return—Insolvency of Debtor no Excuse—Penalty.
 The fact that an execution debtor is insolvent, will absolve an officer from liability for the debt, but it cannot relieve him from the penalty for failure to return the execution.

INSTRUCTIONS.

Instructions are no part of the record unless embodied in bill of exceptions,—vol. 1, 202.

An instruction given to modify an erroneous one, previously given, will not correct the error,—vol. 1, 501.

In a suit by one, who had lived in common with the family had made no charge for services, nor intimated an expectancy of remuneration, instruction should be for the defendant,—vol. 1, 501.

Questions of fact and not the law should be submitted by proper instruction, to the jury,—vol. 1, 389.

An instruction giving undue importance to isolated facts, should not be given,—vol. 1, 297.

Abstract Proposition.

An instruction upon a mere abstract proposition of law should never be given without some evidence to authorize it. 306

An instruction which contains a mere abstract proposition without reference to any evidence offered on the trial, should be rejected, and an instruction making one isolated circumstance or fact more prominent than other facts and circumstances, should not be given. 316

A mere abstract proposition of law should not be submitted to jury by instruction, without evidence upon which to base it,—vol. 1, 373.

Action on Open Account.

In a suit against the firm of Alexander & Co., for the proceeds of the sale of tobacco, their correspondent having remitted the proceeds to the credit of the firm of Jo. B. Alexander & Co., of the same town, an instruction "that any one or more of the members of said firm of Alexander & Co., had a right to direct the mole of transmitting the proceeds of the tobacco to them, and if Kirkpatrick & Co., in good faith transmitted the proceeds to their correspondent, believing the letters from Jo. B. Alexander & Co., was the firm of Alexander & Co., without knowledge that there were two firms different in their constituent members, the transmission would bind all," is held to be a proper construction of the law. 592

Same.

And the following instruction was properly refused; "that a payment by Kirkpatrick & Co., on the order of Jo. B. Alexander & Co., did not bind the firm of Alexander & Co., although such order was understood and acted upon by Kirkpatrick & Co., as the order of Alexander & Co., of whom said Jo. B. Alexander and Baker were members." 592

Adverse Possession—Conflict of Proof is Question for Jury.

Where the proof does not clearly show whether the possession of a plaintiff was as joint tenant and therefore not adverse in law, or was in severalty, and therefore apparently adverse in both law and fact, it is error for the court to exclude, by an instruction, this question from the consideration of the jury. 532

Adverse holding authorizes presumptive notice to landlord, and it is error to instruct the jury that actual notice must be given adverse claimant in possession,—vol. 1, 494.

Written Contract.

In a suit to enforce a written contract, where one of the articles purchased was by mistake and oversight omitted from the contract, an instruc-

INSTRUCTIONS—Continued.

- tion that "the law presumes the written contract read to them expresses the full terms of the agreement made between the parties, and the jury will so find, unless they are satisfied from the evidence that the contract about the shelling machine was left out of said writing by the mistake of the parties when signed by them," is held to be the true expounding of the law. 30
- Delivery.**
An instruction in effect "that the plaintiff under the contract might recover the price of the wool, without showing actual or constructive delivery" is held erroneous. 60
- Instructions as to Competency of Evidence.**
It is error to refer the competency of evidence to the jury. All evidence permitted, by the court, to go to the jury should be regarded by them as competent. 33
- Evidence—Jury to Determine its Weight—Peremptory Instruction.**
Evidence introduced by a defendant tending to prove an indebtedness of the plaintiff on the accounts relied on as set-offs should be submitted to the jury, that they may determine what parts, if any, or how much of the accounts had been proved, and not by a peremptory instruction limit the credits to the admissions in the reply. 601
- Fraud or Forgery.**
An instruction, "that fraud or forgery is not to be presumed but must be proved," where qualified by the proof of what was said and admitted as evidence on the issue of fraud, and the whole of which was before the jury, would not so lead them to understand that forgery must be proved by positive and direct testimony; and could not be inferred from the proof of facts. 175
The following instruction, held erroneous, "if the jury believe from the evidence, that after the alleged sale from F. Haggard to his attorney, said Haggard retained control and use of his property, the sale as to creditors and third persons was fraudulent and void."—vol. 1, 14.
- Disorderly House—Indictment for Permitting—Words and Phrases.**
On an indictment for permitting the keeping of a disorderly house on premises owned by him, the jury were instructed "that if the defendant did then and there in any house, or any premises in his possession or under his control, suffer any men and women, etc." Held that the use of the word suffer, was in place of permit or consent, and was not misleading to the jury. 251
Where averments of indictment are not supported by the evidence, the court should instruct for defendant,—vol. 1, 243.
- Measure of Damages.**
An instruction which in effect tells the jury that the measure of compensation for the injury complained of in the petition, is double the fair and reasonable rent of his property for the time he was wrongfully kept out of possession, is held not improper and erroneous. 211
- Conflict of Evidence—Measure of Damages.**
Where there is an apparent conflict of testimony, on a question of warranty, the jury should be allowed to decide the measure of damages, and a peremptory instruction is improper. 61
An instruction is held to be erroneous that seeks to establish a responsibility upon mere information and gives the jury the alternative of fixing damages to the amount of the judgment, or the value of the property subject to execution,—vol. 1, 11.
Nor should the jury be instructed as to criterion by which a value could be arrived at,—vol. 1, 11.
- Navigation—Obstruction in River—Damage to Water Crafts.**
In a suit by appellees to recover for damages to their flat boat, caused by the temporary erection of a dam across the river by appellants, and

INSTRUCTIONS—Continued.

for which a verdict and judgment was rendered, the following instruction "that the liability of appellants is made to depend on the question whether the accident occurred without the fault of appellees, and alone from obstructions to navigation caused and kept in the river by the appellants other than such as were merely necessary to enable them in a reasonable time to repair their mill dam," is held to be the correct rule of law therefor. 478

Coroner's Deed—Evidence of Title—Authority to Execute—Peremptory Instructions.

Where neither the judgment, nor execution under which a coroner's deed purports to have been made, even offered in evidence, which was necessary to render the deed competent, a peremptory instruction is proper. 407

Contradictory Evidence—Peremptory Instruction.

Where there is a contrariety of evidence the jury should be permitted to find on it without a peremptory instruction. 124

A peremptory instruction should not be given defendant, in a suit for recovery of money paid under a mutual mistake,—vol. 1, 589.

Contrariety of Evidence.

Where there is some contrariety of evidence a peremptory instruction should not be given, even though a second instruction be given, which might have cured the improper peremptory. 554

Personal Property.

A defendant to a suit to recover the purchase price of personal property, asked for an instruction, that if the jury believed from the evidence that the title to the property for which the note sued on was executed, was not in the vendor, but in some other person, they must find for defendant, unless they believed he had been authorized by the owner to make the sale: Held to have been properly refused, where no breach of a warranty of title is shown. 395

Pleadings—Allegations in Petition.

It is error to instruct the jury that they ought to take as true all the allegations in the petition, not denied by the defendant in his answer. ...154

By this instruction questions of law were submitted to the jury—whether a fact which alleged in any part of the pleadings be material or immaterial to the matter in issue, is a question of law for the court. 154

Conditional Sale—Personal Property.

Upon a contract to furnish horses to the Government, the evidence showed that two of the horses had been delivered to the Government Agent, but never inspected, and not paid for. In a question of which of two vendors should stand the loss, the jury should have been informed by proper instructions whether it was an absolute or conditional sale, whether the horse had been delivered as directed by one vendor, whose duty it was to have them inspected, and whether delivered, branded or unbranded. 632

Sale.

Where a private sale, under an execution levy is made, and no proof, in a subsequent action, that this sale, produced as much as a public sale, it is error for the court to refuse an instruction, "that such a sale was a breach of the sheriffs bond and made him liable to this action for whatever damage resulted to Powell from failing to make a public and official sale of the horses." 622

Rents—Facts Alleged in Petition not Controverted, Taken as Confessed.

A petition, on an account, charging rents upon land, for a stated period, imports an allegation that the lands were used for the time as charged and an answer which does not controvert this fact, is properly treated by the court as an admission, and an instruction predicated on this view is not erroneous. 56

INSTRUCTIONS—Continued.

Slander—Evidence.

Where there is a contrariety of evidence in an action for slander, the question is one of fact peculiarly within the province of the jury, and they should be instructed that if they believe from the evidence, plaintiff denied the malice, but truthfully explained the arrest, its manner, and the part he took in it, they should find for him. 325

Defendant had a right to an instruction predicated on the jury's belief of the evidence presented by him as to his justification, and if the jury should consider this as over-balancing plaintiff's evidence, to find accordingly. 325

In an action for slander, the court erred in instructing the jury, that if they believed from the evidence, the defendant spoke the words charged in the amended petition, they should find for plaintiff,—vol. 1, 213.

Statute of Limitations—Promise to Settle Mutual Accounts.

In a suit on account, where the plea of limitations is filed with the answer, an instruction that a promise to settle mutual, subsisting accounts or an acknowledgment that he did not dispute plaintiff's account but that he had a larger account against him, was not such an acknowledgment as would take the accounts of the plaintiff out of the Statute of Limitations, is held to be erroneous. 601

INTERFERENCE.

The interference by an older title to about five acres is not so essential as to justify a rescission,—vol. 1, 366.

Where there has been neither eviction nor adverse occupancy, appellant should accept a conveyance with general warranty,—vol. 1, 366.

A surveyors report that shows that only about 5 per cent of the whole amount of land sold, is within the interference,—vol. 1, 75.

INTEREST.

As to legal manner of computing interest on notes where partial payments made,—vol. 1, 504.

Administrator De Bonis Non—Debt Due from Himself.

Where an administrator de bonis non has acted improperly in not having an inventory of what came into his hands and thereby failing to preserve the evidence of the debt due by himself to his decedent, all reasonable presumption should be taken against him. 144

It is error to compound interest against the administrator with biennial rests 144

Husband and Wife—Use of Wife's Property.

As the husband has the joint use of the wife's property during their lives, his estate is chargeable with interest on the use of personal property of the wife after his death only. 644

A guardian should pay interest on his ward's money remaining in his hands after her marriage,—vol. 1, 367.

Rent, after it is due, carries interest like other obligation originating in contract,—vol. 1, 8.

Installments—Subsisting Debt.

When installments of interest, which are specified in an obligation, mature, they become subsisting debts then due, with attributes of principal and carry interest as such. 229

Claim for Usurious Interest Established by Assignor before Release from Original Debt.

An assignee of a claim for usurious interest, who was also surety for the assignor upon the original debt out of which the claim for usury originated, cannot establish the fact of the usury by the evidence of his assignor only, until he shall have released the assignor from responsibility on the original liability for money paid as his surety to the original creditor. 205

INTEREST—Continued.

Usury—Voluntary Payment on Note before Due, does not Stop Interest—Jurisdiction of Appellate Court.

The voluntary payment on a note before its maturity, gives the payor no right to stop the interest; therefore only so much as was paid over and above the legal interest, on the sum borrowed, would be usurious. An over-payment thus made of \$48.03 is a sum of which the Appellate Court has no jurisdiction. 287

Land Sold on Installments—Interest Reserved on Note not Usury.

The reservation of ten per cent interest, for one year, in a note for the purchase price of land, in the event of non-payment when due, was a part of the consideration and not usury. 455

A rate of interest of 10 per cent promised in a purchase money note is not for the loan or forbearance of money but is a part of the principal itself,—vol. 1, 322.

Where usurious interest is charged, it must be reduced to the lawful rate,—vol. 1, 240.

INTOXICATING LIQUORS.

The selling of liquor to a minor, without written consent of guardian or parent being a personal offense, does not make landlord liable, unless proven that he knew of, authorized, or consented to it,—vol. 1, 624.

Criminal Law—Tipling House—License Transferred.

Garriot having obtained a license to retail spirituous liquors in a certain house and not choosing to exercise the privilege himself, gave it to the appellee, who was indicted for retailing under that license. Held that the appellee had not violated the law against retailing spirituous liquor without a license. 136

Pleadings—Defective Petition—Suit to Enforce Payment for License as Coffee House Keeper—Liquors.

In a suit to enforce payment for a license to sell liquor, the allegations in the petition must show that the town trustees had the lawful authority to require of defendant the sum alleged owing for the license, and the defendant had promised to pay therefor. 468

A license to keep a tavern on a farm, sufficiently designates the place and does not confine the privilege to any particular house, but only requires that it be within the limits of the farm,—vol. 1, 341.

Same,—as to a "town,"—Ib.

INVENTORY.

It is the duty of the surviving partner to have full and complete inventory of partnership effects made in a reasonable time,—vol. 1, 72-496.

JOINT OBLIGORS.

Sec. 39, C. C. relates to joining or omitting of joint obligors in an action on administrators bond, and not to the judgment to be rendered against those before the court,—vol. 1, 1.

Under this rule, judgment may be rendered against party sued, though other parties, jointly bound, are omitted,—Ib.

Sureties on Bond—Liability for Default of Sheriff—Estate.

Where a settlement is made by a sheriff with the court commissioner, showing a balance due, in a suit against his sureties, and the administrator of his estate, they are held jointly liable. 668

JOINT TENANCY.

Where a will postpones a partition of land devised, until the death of one of the devisees, held to create a joint tenancy only,—vol. 1, 453.

Purchase of land by one partner, under parol agreement for partnership transaction, held to inure to benefit of a co-partner,—vol. 1, 602.

In a suit for settlement of lands of joint tenants, where sale made

JOINT TENANCY—Continued.

from time to time, without accounting, interest of other tenant should be made on the sales, as of the last sale made,—vol. 1, 430.

Lands and Conveyances.

The preponderance of evidence as to a purchase of lands by joint owners, though the deed be taken in the name of one, held to be sufficient to adjudge against an estate a reconveyance of one half to the surviving brother. 515

JUDGMENT.

Injunction will not lie to restrain an unsatisfied judgment,—vol. 1, 244.

Injunction in quarterly court to restrain judgment on purchase money note, for failure of title,—vol. 1, 253.

A decree against infant void, unless guardian ad litem appointed to defend,—vol. 1, 58.

Stockholders and subscribers to stock of corporation are not concluded by a judgment confessed by its president, virtually to himself from assailing it and reducing the amount,—vol. 1, 458.

Whenever by fault of plaintiff or other cause of surprise to defendant, which he could not by ordinary prudence have avoided, a judgment should be vacated and new trial awarded,—vol. 1, 619.

Judgment will be reversed unless petition alleges value or annual rents or profits of property charged to be in hands of defendant,—vol. 1, 192.

Where records fail to show a trial in court below, and judgment rendered for value of rent, reversed,—vol. 1, 336.

Judgment Against Vendor Binding on Vendee.

A judgment against a vendor is binding on him and his vendee until reversed. 401

A judgment is presumed to be right, and is binding until reversed,—vol. 1, 450-374.

Same,—before it can be assailed collaterally, it must be shown to be a nullity,—vol. 1, 450.

Pleadings—Sufficiency of Petition—Administrator—Action Against.

A petition was filed against the sureties on a constable's bond, and against the administrator of the deceased constable, for failure to pay over money collected on claims put in his hands for collection as constable. No defense was made to the action, and a personal judgment was rendered against the administrator and the two sureties: Held that without allegation or proof that any assets came into the hands of the administrator, it was erroneous to render a judgment against him and even with such proof the judgment against him could be only for the debt, interest and costs to be levied of assets in his hands to be administered. 187

A judgment against an administrator cannot be conclusive evidence against a stranger of anything except its own existence,—vol. 1, 230.

Judgment against administrator, not sufficient evidence against grantee of intestate that he was justly bound to the plaintiff in the sum adjudged,—vol. 1, 231.

When against administrator, it should be ordered that the amount be made of assets unadministered in the hands of the personal representative, and of assets descended to the heirs,—vol. 1, 377.

Appeal by One of the Parties—Effect of Reversal of Judgment.

Although only one of a number of parties against whom a judgment has been rendered, appeal, the case will be reversed in its entirety if the controversy cannot be rightfully adjusted without it. 49

Appeal—Filing Away—Motion to Reinstate.

An order directing that a case be filed away is not final and an order of the court over-ruling a motion to reinstate the case on the docket is not a judgment dismissing the action from which an appeal may be prosecuted. 28

JUDGMENT—Continued.

An appeal to circuit court operates as a merger of the judgment,—vol. 1, 213.

A decree, left open to a contingency not such a final judgment as to give Appellate Court jurisdiction,—vol. 1, 617.

Apprenticing Children—Age.

It is an essential part of every judgment, ordering the apprenticing of a child, to ascertain and fix its age. 304

Judgment Presumed to be Rendered on Last Day of Term—Extension of Term—Burden of Proof.

It may be presumed that judgment was rendered on the last day of the term, where there is nothing to the contrary. The burden is on the appellant to show that the term fixed by law was extended. 153

Commissioner's Report—Appeal and Error.

Where a commissioner finds against a defendant, contrary to the rules given by the trial judge in referring matters to the commissioner for an equalization among heirs, such part of the commissioner's report as is violative of the judgment of the presiding judge, will be set aside by the Appellate Court, on the face of the pleadings. 39

Error to include in judgment on commissioner's report, one of a series of notes, not referred to in pleadings,—vol. 1, 504

Discretion of Court to Set Aside Judgment.

Acting under Sec. 800, C. C. the chancellor, suspended a judgment rendered, within the prescribed time, held, that having thus retained the power, within a reasonable time thereafter, to set aside the verdict, he did not abuse a legal discretion in subsequently doing so. 682

Confirmation of judgment by divorcing court, recognizing and legalizing a contract, makes it conclusively binding on both parties,—vol. 1, 10.

Land cannot be sold under an execution on judgment from a quarterly court,—vol. 1, 179.

Judgment in criminal court, established after summons to appear in circuit court, void,—vol. 1, 573.

As to default judgment on note,—vol. 1, 207.

Favorable to Defendants.

A judgment of court, more favorable to defendants than the record discloses, and from which the complainants do not appeal, will not be disturbed. 561

Damages Assessed by Jury—Justice Court—Trespass.

In an action for trespass, before a justice of the peace, a failure to have the damages assessed by a jury, will not make the judgment void, but voidable only. 569

Judgment—Action on Bond—Assessment of Damages.

In an action, founded on bonds of defendants to perform the judgment exhibited and the amount sought to be recovered was specifically stated in accordance with the judgment, the defendant failing to answer, the court is authorized to render a judgment without a jury to assess damages. 663

Default Judgment—Answer and Cross Petition—Pleading.

A subsequent answer and cross petition after default judgment rendered to be presented and filed, must show as grounds for vacating or modifying judgment either unavoidable casualty or misfortune which had prevented an appearance and defense, or for newly discovered material evidence which could not before with reasonable diligence have been discovered and produced. 179

Judgment by Default—Surety—Pleading.

In a suit for a devastavit the petition neither alleges the amount of assets nor its sufficiency to pay off the debts sued for but leaves the amount blank and refers to the appraisement and sale bills to show its sufficiency. Neither of these documents were filed as exhibits Held that

JUDGMENT—Continued.

- a judgment by default against the surety, the only party served with a summons, was void. 143
- Pleadings—Petition—Allegations—Prayer—Default Judgment.**
The allegations and not the prayer in a petition should control a judgment by default. 182
- Rebellion—Forfeiture of Property—Judgment of a Court.**
Though a defendant had taken up arms against his government he could not be deprived of his property until there was a judgment of forfeiture by a court of competent jurisdiction. 80
- Personal Representation—Suit on Bond—Form of Judgment.**
By failure to answer the appellant admits that she has assets in hand sufficient to pay the debt, but the judgment is rendered against her *de propriis bonis*. Held that the judgment cannot be sustained in the form in which it is rendered it should have been rendered to be levied of assets in her hands. 86
- Judgment at Same Term Answer Filed, without Citation or Appearance.**
It is error to render judgment against a defendant on a cross petition, during the same term it was filed, without citation or appearance, or a waiver of it not appearing in the record. 663
A judgment rendered in a cause, submitted before preparation for trial, will, on that account, be reverse, —vol. 1, 223.
- Misprisions—Judgment and Final Orders Corrected.**
Sec. 579 C. C., which authorizes the court, at a subsequent term, to correct its misprision, applies to judgments or final orders. 465
- Clerical Misprision.**
A clerical misprision is no cause for reversal until a motion to correct has been made in the lower court and over-ruled. 177
- Rendered at same Term of Confession—Motion to Set Aside.**
If a final judgment be rendered at the same term upon a confession on motion, the court should set it aside, and a refusal to do so is reversible error; but not erroneous on a non-order of confession when the final judgment was not rendered until the succeeding term, and when no defense was presented. 465
A motion for a new trial suspends the judgment and pending same, cannot be entered so as to make it absolute, —vol. 1, 38.
- Judgment Constructively Vacated—New Trial without Objection.**
On a motion for a new trial, and to set aside a verdict and judgment rendered against appellant, an order appears to have been entered disposing of the motion, and the parties proceeded to try the issues again without regard to the former judgment: Held, that in the absence of objection by the defendant on that ground, the former judgment was constructively vacated by subsequent proceeding, and defendant regarded as having waived his right to said objections on the last trial and judgment. 185
- Must Show all Interests in Mortgaged Property.**
In a foreclosure proceeding, where several parties are interested, the judgment must show the particular interest of each, to determine their standing in the issue. 556
It is error to render judgment, against non-residents before bond is executed, —vol. 1, 452-488.
- Non-resident—Appeal—Affirmance.**
A judgment against a non-resident, constructively summoned, can not be affirmed unless by appeal. 33
- Erroneous as to Representatives of a Defendant Intestate when not before the Court.**
A judgment rendered in a suit, in which an intestate was a party thereto, is erroneous, when the representatives of the deceased are not brought before the court. 345

JUDGMENT—Continued.

Sec. 39, C. C. relates to joining or omitting of joint obligors in an action on administrators bond, and not to the judgment to be rendered against those before the court,—vol. 1, 1.

Under this rule, judgment may be rendered against party sued, though other parties, jointly bound, are omitted,—Ib.

Principal and Surety—Judgment against Principal alone—Erroneous.

In a suit on a guardian's bond, a judgment against the principal alone, is erroneous. It should be against the principal and his sureties. 490

Judgment in Favor of Sureties—Sureties' Right to Collect Debt.

A judgment against the principal in favor of the sureties on his bond, who had not paid the debt, should be for the payment of the amount to the holders of the unpaid debt; the sureties have no right to collect the money. 161

Voidable only—Not Available to Sureties on Bond.

A judgment rendered against minors, in a suit by an administrator to settle the estate of an intestate, is voidable only, and not, by reason of the failure of the infants to answer by guardian ad litem and if prejudicial to them, they may reverse it, but is valid and binding until reversed. 361

Sureties on a bond, executed for the payment of property, sold under such judgment, cannot be heard to complain of its regularity, as to the service upon minors or their answer by guardian ad litem. 361

Judgment of Sale—Death of Defendant—Revivor.

After a judgment, ordering a sale of land and before the sale had taken place, the defendant died, notwithstanding which and without a revivor, the commissioner proceeded with the sale and same was confirmed. Held, that the sale and confirmation were nullities, as there were no parties before the court; it was as requisite to revive as though no judgment had been rendered. 295

Supplemental Pleadings—Mandate of Appellate Court—Relief from on Grounds not Litigated.

After the mandate of the Appellate Court shall have been entered and final judgment rendered by the trial judge in the court below, said judgment may be stayed by supplementary pleadings if the grounds for relief show in the allegations, matters not litigated. But the court cannot allow such proceedings to be begun before the mandate shall be entered or accept such pleadings in lieu thereof. 240

Action against Two Defendants—Summons Served on One.

In an action against two defendants, where one of them resided within the county, and upon whom personal service is had, the return upon the other summons being "not found," a judgment that the plaintiff "recover" of the defendant etc., is held to apply to the defendant upon whom the summons was served and not to both defendants. 568

A defendant on whom process served, cannot assume that judgment will not be rendered before process served on partner and co-defendant,—vol. 1, 411.

Usury.

Usury may be recovered by an action, notwithstanding the judgment for the debt,—vol. 1, 449.

Weight of Evidence.

Judgment will not be reversed because against weight of evidence, where new trial refused below,—vol. 1, 257-211.

A mere preponderance of the evidence will not authorize a reversal, as it is in the province of the jury to determine weight of evidence,—vol. 1, 583.

On a contrariety of evidence, verdict must stand, unless court erred in instructions,—vol. 1, 205.

Where there is no evidence to sustain plaintiffs right, verdict should be set aside,—vol. 1, 397.

If the verdict of the jury is palpable against the evidence, it will be reversed,—vol. 1, 327.

JUDICIAL SALES.

Lands and Conveyances—Duty of Officer.

It is the duty of an officer, selling land under judgment to satisfy an existing lien thereon, to disclose to the bidders any incumbrance existing other than that for which the sale is being conducted, in order that bidders might fully understand the character of title they would acquire if they purchased. 321

Where such sales occur, the officer, after offering the land to bidders, in a solid lot should attempt, before closing the sale, to raise the amount of the debt by offering a designated side or end of the tract or lot; the defendants in the execution being infants, not present at the sale as must be assumed, and incapable of making the designation, if they had been present. 321

Judicial Sales, City of Louisville—Officers Discretion.

By section 812, C. C. in the sale of a small portion of real estate in the city of Louisville, and county of Jefferson, if the defendant does not require less than the whole to be sold, where less will produce the debt, the officer making the sale may exercise his discretion, with a view to the interest of the defendant, whether to sell the whole, or less than the whole, as he may or not think it advantageously susceptible of division. When the whole is sold by the officer, under the power here conferred, where the defendants are infants, and the officer must exercise the discretion conferred upon him, by reason of their disability to direct how the sale should be made, the facts should be stated in the return. ...321

Land—Judicial Sale to Satisfy Lien—Necessary Parties.

A petition for the sale of land to satisfy unpaid purchase money must allege, and plaintiff must show title in some party before the court, who should not adjudge a sale of the land without such an exhibition of title thereto. 328

JURISDICTION.

Where petition filed in one county and venue changed to another, latter county has jurisdiction over intestate's estate, though letters of administration granted in former county,—vol. 1, 439.

County court has no jurisdiction to divide heirs' personal property, which cannot be done in kind,—vol. 1, 272.

As to limitation of county courts over orphans and poor children,—vol. 1, 587.

Where constable undertakes to collect debts, over which the inferior courts have no jurisdiction, he is responsible as agent and not as officer,—vol. 1, 586.

The prima facie presumption is that constable undertakes to collect claims only from persons within his jurisdiction,—vol. 1, 91.

As to jurisdiction of state courts over offense of passing and vending counterfeit national bank notes,—vol. 1, 531.

Dissolving of an Injunction without Final Judgment—Appeal and Error.

The Court of Appeals' jurisdiction extends only to the final orders and judgments of inferior courts and cannot assume jurisdiction of an order dissolving an injunction without a final judgment in the action. 170

Clerical Misprison—How Corrected.

The allegations in a petition suing for recovery of a debt of some \$2,055.00, showed only an obligation for one-half that sum, yet the prayer asked for a judgment for the whole amount, and a verdict was rendered accordingly. Held, to be a clerical misprison, which could only be corrected on a motion in the lower court and until acted on by it, the Appellate Court has no jurisdiction. 182

Pleading—Jurisdiction of Circuit Court and Quarterly Courts of Amount Less Than \$50.

A petition alleging an indebtedness of \$71 was filed in the circuit court, amount due on a promissory note alleged to have been lost and in the progress of the trial an amended petition was filed, stating that the note was entitled to a credit of \$35. Held, that the court did not err in

JURISDICTION—Continued.

sustaining a motion to dismiss the cause for want of jurisdiction, and in determining the question of jurisdiction the amended pleading should be regarded as qualifying and correcting the original petition, since the question of jurisdiction must be determined by the plaintiffs own assertion of his claim and not by the defense of his adversary. 117

Jurisdiction over Cross-petition—Pleading.

Properly filing in the circuit court a petition for injunction and rescission, gave to the court jurisdiction over a cross-petition, for a specific execution and an enforcement of the lien sought to be enjoined. 498

Pleadings—Jurisdiction of Courts over Property not in Controversy.

The circuit court has no right to assume jurisdiction over land not embraced in the petition, nor the appointing of a commission to ascertain the rents, profits, etc., due from a defendant in possession, until an amended pleading shall have been filed charging the defendant with the use and occupation of the land. 170

Trusts—Jurisdiction of Circuit Court.

A circuit court has jurisdiction to effectuate a trust by the sale of land to relieve it of encumbrance and to reinvest the surplus for the beneficiaries. 90

Circuit court without jurisdiction, where debts, less credits, was less than \$50,—vol. 1, 403.

Circuit Court has jurisdiction of process by motion or suit on constable's bond, for failure to pay over money collected on execution, though execution issued from quarterly court,—vol. 1, 543.

Executions—Nulla Bona—Prior Liens—Equity—Creditors.

A return of nulla bona by reason of an assertion of a prior lien, gives to a court of equity jurisdiction to clear the title, it not being material to the judgment debtor, whether the lien claimed was right or not. 674

Courts of Foreign States—Jurisdiction of Person—Restraining Sale of Land

Where a deed to land in this state has been adjudged a mortgage by a court of another state that court having jurisdiction of the person, may restrain the grantee in said deed from selling the land. 82

Action for Trespass by Master of a Steamer.

An action of trespass may be maintained against the master of a steamer, for wrongs committed, though no action therefor could be maintained against the boat except in the admiralty courts of the United States. 655

Jurisdiction of Justice Courts—Jefferson County.

An action for trespass quare clausum fregit, though by implication is an assertion of actual possession, does not come under the prohibition of the act of 4th of March 1866, Myers, Suppt. 575, regulating the jurisdiction of justices of the peace for Jefferson and Kenton counties. 569

JURY.

Questions of fact and not of law should be submitted to the jury by the instructions,—vol. 1, 389.

Diligence is a question of law to be applied by the court; the facts to be applied by the jury,—vol. 1, 540.

Evidence—Facts as to Wrongful Conversion of Property—Demurrer.

Facts in a petition as to money alleged to have been coerced from the plaintiff and which may be denied by the answer, are questions for the consideration of the jury; and a demurrer to the petition should have been over-ruled. 508

KNOWLEDGE.

Knowledge of ones pecuniary affairs presumed,—vol. 1, 50.

LACHES.

One who is guilty of laches cannot complain of a default judgment, though mistaken in his belief of his rights,—vol. 1, 411.

Defendant held to be guilty of gross laches where petition for new trial not filed till one year after judgment rendered,—vol. 1, 21.

A defendant, being advised of material evidence advantageous to him, is guilty of gross laches, if no effort be made to produce same,—vol. 1, 190.

As to gross laches where suit continued from term to term, though citation awarded,—vol. 1, 592.

Attorney and Client—Duty of Client to Look After his Cause of Action.

It is the duty of a defendant to inform the court of the illness of his attorneys, where such facts are within his own knowledge, and to be present in court in person to see that no advantage was taken of him. And in the face of such facts a petitioner will not be acquitted of culpable negligence, or indifference and inattention to his interests. 59

Fraudulent Conveyance—Creditore.

Where one assigns all chattels, choses in actions etc., for the benefit of his creditors, and the trustee appointed, fails to act, and the assignor permitted to control, consume or squander the assets, the creditors are held to be guilty of laches. 541

LAND AND CONVEYANCES.

In suit for recovery of lands, waiving of homestead by widow, renders her an unnecessary party,—vol. 1, 482.

Construction of a description by metes and bounds, where evidence fails to show that either party should account for deficiency or excess,—vol. 1, 433.

Lands are not assets in the hands of the administrator of intestate's estate,—vol. 1, 523.

Where proceeds of wife's property invested in lands sought to be subjected to husbands debts, she is entitled to sufficient for suitable support out of same,—vol. 1, 611.

Purchase of lands by husband and deed made to wife, held to be fraud on creditors,—vol. 1, 285.

Legal title to lands should be matured before sale ordered by chancellor,—vol. 1, 518.

As to mental incapacity of one, making sale of lands, he not understanding its legal effect,—vol. 1, 98.

Entry and possession of land outside the interference held to vest vendors with full title to the extent of the boundary of their deed,—vol. 1, 156

In the loss of a portion of a purchase of land by a superior title, plaintiff entitled to damages for its value,—vol. 1, 529.

The interference of an older title to about five acres of a large tract of land is not so essential as to justify a rescission,—vol. 1, 366.

Where a sale is by the acre, grantee is entitled to a credit for the deficit,—vol. 1, 366.

Specific performance of an executory contract, for the exchange of lands, when neither party is in position to convey the legal title, will not be enforced,—vol. 1, 180.

Judgment of Sale—Affidavit as to Personal Property.

It is error to adjudge the sale of land in the absence of an affidavit that the defendant has no personal property. 97

Pleadings—Jurisdiction of Courts Over Land not in Controversy.

The circuit court has no right to assume jurisdiction over land not embraced in the petition, nor the appointing of a commission to ascertain the rents, profits, etc., due from a defendant in possession, until an amended pleading shall have been filed charging defendant with the use and occupation of the land. 170

Bond for Title for Conveyance of Land to Defraud Creditors—Equity.

A court of equity will not enforce a conveyance of land under a bond

LAND AND CONVEYANCES—Continued.

- for title given by the intestate for the purpose of defrauding creditors, even though the creditors of the intestate did not join in the bill to set aside the contract bond. 170
- Consideration—Reserved in Note not Usury.**
The reservation of 10 per cent interest, for one year, in at note for the purchase price of land, in the event of non-payment when due, was a part of the consideration and not usury. 455
- Voluntary Conveyances—Subsequent Debt—Consideration.**
A voluntary conveyance, without consideration, cannot be avoided on that account alone, by creditors whose debt occurred subsequent to the execution of the deed. 463
- Same—Balance of Purchase Price, Unpaid, Subject to Debts.**
The residue of the unpaid purchase price due under a voluntary conveyance is subject to execution by creditors, whose debts accrued subsequent thereto. 463
- Perfection of Title—Consideration Subjoined.**
In the sale of lands, the vendors title not being perfect, and the possible perfection of it, being uncertain, tedious and expensive, the vendee has the right to enjoin the collection of the consideration until the vendor should, at his own expense, perfect it. 376
- Deeds by Heirs, of an Expectancy.**
A sale of an expectancy, unassailable as fraudulent conveyances, to one, under the supposition that their mother had only a life interest in property devised her by her husband, will be confirmed, and the title subsequently acquired by the grantors, from their mother, will inure to the benefit of their vendee so as to vest a legal title to him. 502
- Title—Unrecorded Deed—Possession.**
A party in actual possession, holding under an unrecorded deed has a superior title to one claiming under a subsequent deed, which has been recorded. 401
- Decretal Sale—Bond for Purchase Price—Reasonable Time to Perfect Title—Resale—Difference in Price.**
The purchaser of land at decretal sale will be required to execute bond for purchase money, if he can get a good title at the time of the sale or in a reasonable time thereafter, and in case of his failing to do so, the land may be resold and if it does not then sell for as much as he bid for it, he would be responsible for the difference. 64
- Decretal Sale—Defective Title.**
Before land is sold by a commissioner all liens and claims against it should be settled in the suit, in order that the purchaser may know what he is buying. 156
- Possession under Division by Parties—Descent and Distribution—Title in Severalty.**
A division of lands, descending to devisees, having been made by actual survey, the parties entering upon their respective parts, separated by a distinctly marked line, and thus held continually is held that the possession thus operated to sever the joint title, and to clothe each one with the title in severalty, freed from all incumbrances on account of any supposed title in a co-devise. 641
- Sale to Son by Father—Unpaid Purchase Price—Distribution.**
A sale of land by father to son, for a consideration, only a small portion of which is ever paid by the son, is held to enure to the benefit of all the heirs less an advancement to him, equal in proportion to that each of the other children may have received. 587
- Land Susceptible of Division.**
It is error to adjudge that an entire tract of land be sold to satisfy a judgment when it is not made to appear that it was not reasonably susceptible of division. 112

LAND AND CONVEYANCES—Continued.

Vacant Lands—Previous Entry—Inchoate Title—Subsequent Entry Void.

Where a warrant for vacant and unappropriated land has been granted and an entry made in the surveyor's book describing same, the warrantee has an inchoate title, which is not destroyed by his neglect to carry it into grant, but on the contrary is protected from subsequent entry by statute. 129

Same—Legal Title.

Where a patent is not obtained within the time designated by law, the only legal consequence is that the legal title enures from the date of the patent instead of relating back to the date of the survey. 129

Sheriff's Sale—Quashal—Innocent Purchaser—Negligence in Seeking Relief—Estoppel.

The negligent failure to seek relief, from a sale of land, by a sheriff until his vendee has sold the property and the legal title having been conveyed to an innocent purchaser without notice, will operate as an estoppel. 48

Estoppel—Purchase at Commissioner's Sale.

A purchaser of land at a commissioner's sale, and which was sold as containing 40 to 50 acres, more or less, is estopped from seeking to be relieved of his purchase on the ground that there was only 36 acres in the tract bought by him. Having purchased the tract in gross and with knowledge of all the facts, he took upon himself voluntarily the risk as to the quantity. 199

Special Warranty—Estoppel—As to Devisees Under Will—Fraudulent Conveyance.

A conveyance by deed from father to son, with a warranty of title, will operate as an estoppel, not only as to the claims of the grantor himself, but against his devisees, heirs and representatives, and is not subject to a collateral attack except for fraud or force in the procurement thereof. 420

Original Survey—Assignment of—Fraudulent Conveyance.

An assignment of an original survey to a large tract of land, on a copy of the original, was made and afterwards the lands were patented to the assignor. The assignment was without consideration and at a time when the assignor was seeking to absolve himself of a large obligation on a bond of a defaulting sheriff. Held, to be a fraudulent transfer of title, though the assignee acquired possession of the lands after the death of the assignor. 342

Sale of—Failure of Title—Fraud and Mistake—Rescission—Burden of Proof.

It is a well established principle that a purchaser who has accepted a conveyance cannot afterwards have a rescission of the contract unless it be for fraud or mistake shown to have operated on him when he accepted the deed and the burden of proof is on the party alleging fraud and mistake. 35

Gift of—Future Recognition—Dower.

The father bought a tract of land and directed the vendor to convey it to his daughter. A few hours before the father's death he called on the grantor to remember his promise to the daughter. No deed or writing having been made between the parties. Held, that a direction to convey to the daughter and future recognition of the gift by her father, must be regarded as a gift of either the money or land to her. The title never being in the father, either equitable or legal, the widow is not entitled to dower. 453

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Wills, Construction of —Descent and Distribution—Reversionary Estate.

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Landlords have a lien on the produce of the farm, and if sold by the tenant, are entitled to the proceeds of the same,—vol. 1, 363.

Where all the stock of goods embraced in a mortgage was sold, lien created thereon was lost,—vol. 1, 259.

Where a right-of-way was sold to a railroad company payable in two installments, which were uncollected, no lien will accrue against a subsequent company, the purchasers of all the assets of the old company, under a sale by order of court,—vol. 1, 618.

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Attachments—Return by Clerk to Wrong Court

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fendant, from the time of his arrest for robbery, and can prosecute a civil action to enforce same,—vol. 1, 436.

Same—Bills and Notes.

A purchase money note, carrying specific installments of interest to be paid, being secured by a lien on the land, the accrued interest thereon was an incident secured and protected by all the safeguards which surrounded and secured the principal, and a lien would attach for such interest, though the principal is not due. 229

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One who purchases property of an insolvent debtor, whose precarious condition was known to him at the time, will be deemed to hold the property in trust for the creditors generally. The payment of part of the purchase money, on the order of the debtor, to a third party, will only give the purchaser a right to be substituted therefor, but he cannot claim a lien for such an amount so paid, over the creditors. 424

Purchase Money Lien—Judgment Enjoined Does not Destroy Lien—Surety On Injunction Bond—Subrogation.

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Judgment of Sale—Commissioners Deed—Lien for Purchase Money.

The judgment directing the sale did not reserve a lien for the purchase money; it was error to convey without reserving a lien. The purchaser being a party to the record, his purchase may be ordered to be cancelled. But where a purchaser is not a party his deed may be set aside by a special proceeding, but this will not affect his purchase. 161

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Lien on Steamboats—Contracts by Usage and Custom.

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Exchange of Mortgage Notes for Notes Unsecured—Substitution.

Though the exchange of mortgage notes given for the purchase price of real property, for those of a stranger and unsecured, might prima facie imply a waiver of the lien, but if this be done for the accommodation of the mortgagor, about to remove to another State, it would be a mere substitution, and would not extinguish the lien. 359

Trusts—Right of Redemption of Trust Property.

A sale of mortgaged property with a right of redemption by the mortgagor being given by the purchaser the property being of a value of \$2,000 and sold for \$179.08, and the mortgagor continuing in possession without a definite contract as to rent or future surrender, is held not to be a sale absolute, but in trust for the creditors of the mortgagor. 535

Same—Lien.

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Lien—Unpaid Purchase Money—Waiver.

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notice to remaindermen and will not be abrogated after being acted on for nine years without objection,—vol. 1, 443.

The remainder, after a life estate, is a vendible interest, however remote and contingent,—vol. 1, 304.

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Descent and Distribution—Remainder.

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Same—Remainder.

The father of the remaindermen, having purchased their interest at execution sale his note, given therefor, is subject to be paid out of the deceased estate. But this will not affect the life estate of the wife in the land, and she cannot be estopped from asserting her tenancy to the tract. 528

Descent and Distribution—Residuary Legatees.

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Pleading—Notice to Surrender Possession in Ejectment—Life Tenancy by Parol Agreement.

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No statutory limitation can relieve a devisee of the liability upon which his title depends,—vol. 1, 365.

Deed from husband to wife more than twenty years before beginning action,—vol. 1, 75.

A prosecution for permitting gaming in house, is subject to the limitation of five years and one year after the commission of the offense,—vol. 1, 215. Creditor must claim the benefit of a transfer within six months from the delivery of property or recording of instrument,—vol. 1, 50.

When Right of Action Accrues.

Where property, held under an express or implied trust, which would not accrue until the death of the grantor and a refusal to fulfil the trust, neither a statutory or presumptive bar will apply. 550

Statute of Limitations—Bills and Notes—Presumptive Evidence of Payment.

Lapse of time cannot operate as a statutory bar to an action on a note, its only legal effect being presumptive evidence of payment as pleaded. A payment not pleaded, cannot be presumed. 560

Bill of Exchange—Subsequent Promise Must Be Alleged.

When an action on a bill of exchange is barred by limitation, which is pleaded, and a subsequent promise to pay is relied on it must be alleged, and the statement that one deems himself bound for the debt cannot be construed to be an unconditional promise to pay. 79

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Same—Alienation of Property Under Devise—Wills.

A provision of a will that "after the death of the devisee, every species of the property that could be found," would imply, that should any of the estate be alienated, so much thereof as should remain in kind and could be identified, should be distributed equally among the legatees. This express limitation upon the exercise of a power to dispose of the estate, only during life, is a limitation on the estate, and not on the power conferred by will. 418

Express Trust—Corporations—New Institutions Liable for Debts of Old.

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Statute of—Landlord and Tenant.

In the settlement of mutual accounts between landlord and tenant, under a specific lease, the statute of limitations will not apply for either party. 530

Pleadings—Amended Petition.

Limitation does not run against an amended petition which only supplies a defect in the original, as the original was not barred by time....100

Married Women.

The statute of limitations does not begin to run against a married woman until she becomes discoverd. 377

LIS PENDENS.

Actual services must be had to constitute lis pendens,—vol. 1, 377.

Land and Conveyances—Lis Pendens Purchaser.

One who had been appointed to execute a judgment of court for the sale of land, and which was delayed, and who afterwards purchases the land of one of the contesting litigants in a subsequent suit, is held to be a lis pendens purchaser, with actual notice of the suit pending. 427

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An indictment charging the setting up, promoting and managing a lottery for money, is sufficient,—vol. 1, 585.

LUNATIC.

One appointed committee for handling the estate of a lunatic cannot escape liability for such property as may come into his hands as such committee on the ground that the adjudged lunatic was sane and capable of managing his own affairs,—vol. 1, 596.

Same—The purchase of lands in the name of and for the benefit of the one appointed committee, would not create a trust for the lunatic, the committee only being liable for the amount of funds coming into his hands, with interest,—*Id.*

MAINTENANCE.

Debtor's Right to Maintain Family.

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Same.

But as indulgent as the law is, it will not permit a debtor, after acquiring property by his skill, industry or credit, to secure to himself an estate by making his family the depository of the title for the purpose of defeating his creditors. 101

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Divorce—Pendente Lite Allowance for Maintenance.

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MANDATE.**Mandate of Appellate Court—Duty of Judge of Lower Court to Obey.**

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Supplemental Pleadings—Mandate of Appellate Court—Relief from, on Grounds Not Litigated—Judgment.

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MARRIED WOMEN.**Second Marriage—Effect of Dower.**

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A married woman is not bound by her verbal contract to relinquish her dower, but has a right to abandon it,—vol. 1, 97.

Sale of Land—Long Acquiescence.

Where there has been a long acquiescence in the sale of land by married women, who still survive, and the heirs of the deceased one are willing that the sale should be confirmed, and as a good title can be decreed, it is more equitable to sustain the sales than to set them aside. 49

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MEMORANDA.**Decedent's Estate—Memorandum Book—Evidence.**

A memorandum book kept by the intestate as to advancements is competent evidence. 131

MEASURE OF DAMAGES.

Sale of Personal Property—Stock in a Petroleum Company.

The measure of damages for failure to pay for subscription to stock is not its par, but its cash value on the day to be paid. 629

MENTAL INCAPACITY.

Conveyance, without consideration, leaving one homeless, shows mental incapacity,—vol. 1, 98.

Wills—Antipathy Toward Children—Mental Delusion—Verdict—Judgment.

The antipathy which the deceased indulged toward his children, without cause, and out of which he could not be reasoned, indicates mental delusion, which resulted in the production of the document now sought to be established as his will and if this conclusion was more doubtful than it is, it might be made preponderant by the verdict of a jury of neighbors, confirmed by a judgment of the circuit court. 150

Redemption—Physical Restraint—Mental Disability—Excuse for Non-Tender.

Physical restraint and mental disability is an equitable excuse for not making a precise tender for redemption and a court or equity will require one to surrender this advantage and accept the amount to which he is legally entitled. 73

MILITARY ORDERS.

An order for confiscation of property must be produced as a defense, if sought to be available as justification,—vol. 1, 177.

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Fixtures—Contract of Conversion—Property Becoming Part of the Freehold.

Under the law of fixtures, it is held that the placing on the premises by the lessee of implements for the purpose of operating mines thereon, under the contract of lease, would not give the owner of the freehold a claim to the fixtures, when they can be removed without causing material injury to the estate. They remain the unquestionable property of the lessee.....279

MINORS.

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The appearance of a minor defendant cannot be entered by attorney,—vol. 1, 520.

A next friend cannot defend for minor children; none but a guardian can do this,—vol. 1, 444.

Failure to Appoint Guardian.

It is reversible error to render a judgment against a minor without having a guardian appointed to defend for him. 264

Minor's Contract, Enforceable When—Evidence.

The purchase of a horse by a minor to operate a farm upon which he was living as the head of a family, and from the use of which a support for himself and family was obtained; and the jury believed that the purchase by the minor of the horse was necessary for the minor's use, though while he could not bind himself by the execution of a note therefor, the law will bind him to pay the reasonable value of the horse; and what he promised to pay for the horse, will be competent evidence conducing to show its value. 264

Covenants—Bond to Commonwealth for Benefit of Minor Heirs—Sales.

The entering into a covenant to the Commonwealth, by a guardian desiring the sale of property belonging to minors, with security stipulating for the benefit of the infant heirs, a faithful performance of his duties as guardian, and that he would perform the orders of the court, is essentially and lawfully in every legal sense, a bond to such minor heirs and wards separately and collectively. 335

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Purchase of Personal Property by Wards Credited to Account of Guardian.

Where minors, purchase at a judicial sale, personal property, of the estate of which they are heirs and take possession of and use the same, continually, their guardian should be credited against an estate under his control with the amount bid by the wards. Or upon an adjustment of accounts said property should be turned into the hands of the guardian...490

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MISDEMEANOR.

An appeal from a prosecution for, must be lodged in the office of clerk of Court of Appeals within 60 days after judgment,—vol. 1, 445.

Error to render judgment on, greater than fine imposed and cost of court,—vol. 1, 423.

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MISJOINDER.

Misjoinder of Causes—Pleading—Non-Suit.

Though two distinct causes of action are shown by a petition, one on contract and another on tort, such a misjoinder cannot be taken advantage of by objection thereto in the answer of defendant. To be available as an objection, motion to strike out either contract or tort must be made, and this being the statutory mode for excepting to the misjoinder, which, having been waived by non-exception in the prescribed mode, would be no ground for non-suit ordered by the court. 174

MISNOMER.

Where parties litigate a question raised by a document mis-styled "Reply," found in the papers, it is a part of the record, though not marked filed,—vol. 1, 536.

Deposition—Notice.

A notice to take depositions was in the name of Greene, appellee, and in the caption, it stated that they are to be used in the case of Green assignee of Shepperd.. Held, that it was not insufficient to authorize the court to exclude the depositions. 154

MISPRISION.

Rendering judgment before cause stood for trial, on account of terms of court changed by law, is a clerical misprision,—vol. 1, 69.

Judgment and Final Orders Corrected.

Sec. 579 C. C., which authorizes the court, at a subsequent term, to correct its misprision, applies to judgments or final orders. 465

Judgment.

A clerical misprision is no cause for reversal until a motion to correct has been made in the lower court and over-ruled. 177

Clerical Misprision—Objection—Judgment.

A judgment will not be reversed for a clerical misprision, until the objection has been presented and acted on by the court rendering the judgment. 217

Clerical Misprision—How Corrected—Jurisdiction.

The allegations in a petition suing for the recovery of a debt of some \$2,055.00, showed only an obligation for one-half that sum, yet the prayer asked for a judgment for the whole amount, and a verdict was rendered

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accordingly. Held, to be a clerical misprision, which could only be corrected on a motion in the lower court and until acted on by it, the Appellate Court has no jurisdiction. 182

MISTAKES.

Money paid by one party to another under a mutual mistake, held to be without consideration,—vol. 1, 589.

Where draftaman makes mistake in reducing contract to writing, for purchase of land,—vol. 1, 528.

Where execution of writing is admitted and debt, relies on a mistake, allegation of answer, stood controverted, and the affirmance was on debt,—vol. 1, 368.

Accounts, Mistakes Corrected by Court of Equity.

A clause in a memorandum obligation, made in settlement of accounts between parties of "due, etc., if there is no mistake" would secure no right to either party which a court of equity would not correct, if either of the parties could show there was a mistake in the settlement prejudicial to the one complaining in the absence of the words quoted. 254

Contracts—Writing Evidencing—Presumption—Burden of Proof.

The presumption of both law and facts are that the written memorial contains all the covenants of the parties and he that asserts it does not, (but that some were left out by mistake or oversight), must bear the burden of proof. 30

Deeds—Mistake in Drafting—Intention of Donor.

A father intending to divide all his lands to his children, instructed his draftsman, to make out deeds to each of his daughters. Only one of the deeds was read over to him before signing all. Afterwards it was discovered that one of the deeds was made to the husband of one of the daughters and this only shortly before her death. The property was recognized by the husband, as belonging to his wife, during her life: Held to be such a mistake as will authorize the court to cancel the deed to the husband. 511

Husband and Wife—Lands Purchased by Wife—Erroneous Conveyance to Husband.

A deed from husband to wife, though technically invalid, is held good, where it is shown that the land embraced therein was paid for by the wife out of her patrimony and the deed made to the husband through mistake. 488

Land—Partition—Agreed Time—Long Acquiescence.

Where the owners of land agree upon a partition line and each occupy their respective parcels up to that line for a long time by themselves and vendees, a court of equity will not disturb it, although there might have been a mistake in the written evidence of the partition. 29

Costs—Plaintiff Entitled to His Costs When Petition Corrects Errors.

Where, in a petition by the plaintiff, he succeeds in correcting mistakes charged therein, he is entitled to recover his costs, though the petition may not be sustained and relief granted as prayed for. 243

MORTGAGES.

As to mortgage, contemporaneous to becoming debtor of mortgagee and therefore not assailable by creditors,—vol. 1, 51.

Where not made in contemplation of insolvency and without design to prefer creditor, does not come within the provisions of acts, 1856,—vol. 1, 13.

It being the duty of a purchaser of property, burdened with a mortgage, to apply his deferred payments to its extinguishment, and therefore not entitled to consequential damages by reason of foreclosure,—vol. 1, 472.

Where all the stock of goods, on which a mortgage was given, was sold, the lien thus created, was lost,—vol. 1, 259.

Sale, mortgage or lien to secure one creditor, to exclusion of others,

MORTGAGES—Continued.

held to inure to benefit of all,—vol. 1, 50.

To constitute a mortgage, right of property must be changed, and title vested in grantee or vendee,—vol. 1, 348.

Recording of trust deed, conveying life estate, is constructive notice to remaindermen,—vol. 1, 443.

A mortgage of "all my personal property consisting of all the stock of horses, cattle, sheep and hogs," and "all farming utensils of every kind and description, etc., not exempt," held to cover only the property mentioned by the wording of instrument,—vol. 1, 511.

Same,—"all the property, consisting of" held to limit and define the kind of personalty thereafter conveyed,—vol. 1, 511.

Where sale of trust property necessary to pay the debts trustee has right to determine what description of property shall be sold,—vol. 1, 139.

Same,—trustee could, without aid of chancellor, pass title to land,—vol. 1, 139.

Deed of assignment sufficient, though trust deed neither acknowledged nor recorded,—vol. 1, 530.

Failure of Mortgagee to Assert Mortgage

The failure of a mortgagee to assert his claim for many years, while the property it still in the hands of his principal who thereby could use same for the purpose of inducing others to become his surety, or to disclose his lien when the property is being assessed of, are cogent circumstances against the justness of his claim. 517

Deed of Gift—Infant's Contracts Void—Fraudulent Conveyance.

On the 16th day of May, 1865 Mary Price made a voluntary deed of gift to her infant daughter, Florida Price, of various articles of household furniture and the deed was duly recorded. Afterwards, the mother and daughter executed their joint note with a mortgage on the furniture to secure its payment: Held, that as the record discloses no evidence of actual fraud in the execution of the deed of gift, and as it was made before the debt of appellee existed, it therefore operated to vest the title to the property in the infant and she had a right to avoid the note and mortgage on the grounds of her infancy. 315

Fraudulent Transfer.

Facts as to dismissal of a suit to foreclose a mortgage, and a receipt given in full liquidation by acceptance of rent notes by mortgagor, held sufficient to declare fraudulent a subsequent assignment of said mortgage, and denial of genuineness of the receipt. 604

Pleading—Petition—Mortgage Exhibits—Rule to File—New Trials.

When a petition discloses the existence of a mortgage and proposes to file it, it is in the power of the defendant to compel the plaintiff to do so, but if he fails to exercise this right, or to interpose any other objection to the judgment in the circuit court, the irregularity is not a cause for reversal. 81

Sale of Property with Actual Notice.

A mortgagee who knowingly permits and sanctions the sale of lands embraced in his mortgage, and allowed the purchaser to occupy same adversely to his claim for a period of years before he discloses his claim, is debarred from asserting his claim under the mortgage, against the purchasers of the property. 517

Lien—Exchange of Mortgage Notes—Substitutions.

Though the exchange of mortgage notes given for the purchase price of real property, for those of a stranger and unsecured, might prima facie imply a waiver of the lien, but if this be done for the accommodation of the mortgagor, who was about to remove to another state, it would be a mere substitution, and would not extinguish the lien. 359

MOTIONS.

Motion to Dismiss Appeal—Appeal and Error—Waiver.

Pending action on a motion to dismiss an appeal, the filing of a brief by appellee on the merits of the case does not constitute a waiver of the motion; the filing of the brief and motion to dismiss were simultaneous and intended to operate alternately. 63

Judgment—Rendered at Same Term of Confession—Motion to Set Aside.

If a final judgment be rendered at the same term upon a confession on motion the court should set it aside, and a refusal to do so is reversible error; but not erroneous on a non-order of confession when the final judgment was not rendered until the succeeding term, and when no defense was presented. 465

Motion made to set aside judgment two months after term, comes to late,—vol. 1, 68.

Appeal and Error—New Trial—Requirements in Motion for.

The provisions in Sec. 372 C. C., as to applications for a new trial by motion etc., requires all errors, which the party complaining, deems to have been committed prejudicial to him in the progress of the trial, must be presented in writing as grounds for a new trial, in order to direct the attention of the Appellate Court to the alleged errors, for correction. The mere objection to the introduction of testimony during the trial, is not sufficient. 451

A motion for a new trial suspends judgment,—vol. 1, 36.

Motion for a New Trial—Reasons Therefor.

A motion for a new trial was made within the time prescribed by law but no reasons therefore were filed: Held, that merely handing the grounds for a new trial to the clerk is not sufficient; an order must be made showing they were filed under the authority of the court.....457

MUTUAL PROMISES.

Do not have to be in writing in order to make them obligatory on parties,—vol. 1, 172.

Same,—it is sufficient if the promisee parts with property, or suffers some loss or prejudice,—Ib.

NAVIGATION.

Navigation—Obstruction in River—Damage to Water-craft—Instructions.

In a suit to recover for damages to a flat boat caused by the temporary erection of a dam across the river, question as to whether plaintiffs were at fault or that the damage alone was caused by said obstruction, was held, properly submitted to the jury. 478

NEGLIGENCE.

Where express company has reasonable time to deliver, or offer to deliver goods, held liable for loss of same through robbery,—1, 295.

Bills and Notes—Contract for Payment in Lumber.

A contract for delivery at a given point, of personal property, in settlement of notes, though the property be not accepted, the debtor is entitled to recover against the creditor the value of such of the property as was lost by reason of the creditors negligence. 476

Personal Injury—Careless Driving on Streets—Infants.

F. Roberts while driving rapidly through the streets of Louisville, ran over, and materially injured a child of some four years of age. The accident occurred at the curbing, where the child was seen to be trying to get up, when the buggy of Roberts ran over it. His attention was called to the child being ahead of him and in the street, but did not slow up or turn his horse so as to avoid the wheels of the buggy running up against the curbing, at the point where the child was seen to be clamoring up: Held to be contributory negligence by Roberts, and liable for personal damages sustained by the infant. 272

NEWLY DISCOVERED EVIDENCE.

New Trial.

Newly discovered evidence to constitute grounds for a new trial, must be such as was not within the knowledge of a defendant at the trial in the court below. And the affidavits must show conclusively that the defendant did not know of the existence of the newly discovered evidence at the time of the trial and that it would have been impossible for him to have used same. 242

New Trial—Newly Discovered Testimony—Affidavits.

On an application for a new trial, based on the grounds of newly discovered evidence, where not sustained by the affidavits of others than the appellant, the court is not authorized to grant a new trial on that ground alone. 95

New Trial.

Newly discovered evidence, disclosed after a trial, relating to matters which were contested on the trial and as to which several witnesses were examined, held, not sufficient to authorize a new trial. 458

New Trial—Effect to Mitigate the Offence.

Alleged newly discovered evidence, though showing no semblance of justification for slanderous words, where its doubtful tendency might serve to slightly mitigate the amount recoverable, will authorize a new trial, and no wrong be done the appellees. 566

Bill of Review.

In the absence of an allegation in a bill of review, that evidence, offered to sustain same, might not, by ordinary diligence, have been discovered in time to have been used on the first hearing, it is not error to dismiss the proceedings. 548

NEW TRIAL.

New trial will be granted, where, from a preponderance of the evidence, it is shown that verdict was palpably erroneous in matters *ex contractu*,—vol. 1, 607.

Where evidence conflicting, new trial will not be awarded,—vol. 1, 367-227.

Failure of counsel to put in defense, where not shown that appellants were unavoidably prevented from making defense, will not warrant reversal,—vol. 1, 90-68.

Breaking of an agreement by plaintiff, or other cause of surprise to defendant, which he could not by ordinary prudence have avoided or discovered, grounds for new trial,—vol. 1, 619.

Motion made for new trial, two months after judgment rendered, chancellor has no power to re-open,—vol. 1, 68.

An appeal from errors committed in refusing to allow counsel to comment on answers of defendant, must be embraced in written application for new trial,—vol. 1, 620.

In equity suit, petition for new trial must bring case within Sec. 579, C. C., of practice,—vol. 1, 80.

Affidavit Must Show Good Defense—Unavoidable Absence.

To entitle an appellant to a new trial, it is not sufficient to show that he had a good excuse for being absent from court; but he must show a good defense to the action by setting forth that defense to enable the court to judge of its efficiency, and that he had made the necessary preparations or efforts to be ready to try the case, and that he was prevented from making his defense by his absence, which was unavoidable. 307

Exception.

If no exceptions are taken at the time, to the ruling of the court below in granting a new trial, if any error is committed the same must be regarded as waived. 181

Violation or Right Instruction by Jury.

Though there be no substantial error in giving or refusing instructions,

NEW TRIAL—Continued.

- a verdict inconsistent with a proper instruction given, will authorize the granting of a new trial. 622
- Misconduct of Jury—Evidence.**
Jurors are not permitted to testify as to any misconduct of themselves, or their fellow-jurors, nor as to what influenced them in making up their verdict. It is against the policy of the law to allow such evidence. 236
A new trial should be granted where the verdict greatly exceeds the amount justly recoverable. 100
- Newly Discovered Evidence—Effect to Mitigate the Offence.**
Alleged newly discovered evidence, though showing no semblance of justification for slanderous words, where its doubtful tendency might serve to slightly mitigate the amount recoverable, will authorize a new trial, and no wrong be done the appellees. 566
- Newly Discovered Evidence.**
Newly discovered evidence to constitute grounds for a new trial, must be such as was not within the knowledge of a defendant at the trial in the court below. And the affidavits must show conclusively that the defendant did not know of the existence of the newly discovered evidence at the time of the trial and that it would have been impossible for him to have used same. 242
- Newly Discovered Testimony—Affidavits.**
On application for a new trial, based on the grounds of newly discovered evidence, where not sustained by the affidavits of others than the appellant, the court is not authorized to grant a new trial on that ground alone. 95
- Pleading—Newly Discovered Evidence.**
After the adjournment of the court, whether upon petition or otherwise, it has no power to alter, change, or set aside any order or judgment made or entered by it while sitting as a court, but upon discovery of grounds for a new trial, after the term at which the judgment was rendered, an application may be made to the court by petition for a new trial, as provided by section 373, C. C. 64
- Newly Discovered Evidence.**
Newly Discovered evidence, disclosed after a trial, relating to matters which were contested on the trial and as to which several witnesses were examined, held, not sufficient to authorize a new trial. 458
Newly discovered evidence of cumulative nature, which could have been discovered by ordinary diligence, not grounds for new trial,—vol. 1, 259.
Parol newly discovered evidence, as to the only point litigated,—vol. 1, 616.
New trial not awarded, where evidence conflicting, and proper instructions given,—vol. 1, 479-211-227.
Nor as to a mere preponderance of evidence,—vol. 1, 332.
But where preponderance is decidedly against verdict it should be set aside,—vol. 1, 79-397.
- Verdict not Sustained by the Evidence.**
On the issues formed there was a contrariety of evidence before the jury, which it was their peculiar province to weigh. On well settled principle of practice, the court should not have granted a new trial on the grounds that the jury had erred, unless the verdict was clearly against the evidence. 276-458
New trial not awarded because verdict against weight of evidence,—vol. 1, 267, unless it be clearly so,—583.
The refusal of the trial court to grant a new trial on the ground that the verdict of the jury was not sustained by the evidence, is not subject to revision by the Appellate Court. By Sec. 349, Crim. Code, "an error in granting or refusing a new trial" is not one which is sufficient to reverse a judgment. 200
Matters tending strongly to disprove the cause of action, and which

NEW TRIAL—Continued.

might have influenced verdict upon application, by proper affidavit on discovery of evidence, held grounds for new trial,—vol. 1, 189.

Testimony of Absent Witnesses.

Where an affidavit of defendant for a continuance manifests due diligence in preparing for the defense, and shows that the testimony of his absent witnesses would be material for establishing his lien and the extent of it, a motion for a continuance should be sustained and where over-ruled, a new trial will be awarded by the Appellate Court. 141

A petition for new trial, that the defendant had prepared defense by summoning witness by whom he could have established defense, without averment that the defense would have been established, not good,—vol. 1, 537.

NON-RESIDENCE.

Judgment—Appeal—Affirmance.

A judgment against a non-resident, constructively summoned, can not be affirmed unless by appeal. 33

Attachment—Want of Authority to Enter Appearance by Attorney—How Made Known.

It will not be judicially presumed that an attorney had no authority to enter an appearance for a defendant, but if he should do so without such authority the whole judgment would be void; this can only be shown by a direct proceeding for that purpose. 161

Attorney must be appointed for non-resident, constructively summoned sixty days before judgment can be rendered,—vol. 1, 337.

And plaintiff must execute bond as provided by Civil Code,—vol. 1, 498.

Error to take petition against non-resident for confessed, without appearance, though attorney appointed,—vol. 1, 454.

Judgment Against a Non-resident—Pleadings—Essentials of Petition.

As a petition, against a non-resident, averring a readiness to convey lands sold to defendant, stands traversed, it is essential to recovery, that the plaintiff show he possesses an unencumbered legal title, and a tender of such a deed made in court. 629

NEXT FRIEND.

A next friend cannot defend for minors,—vol. 1, 444.

NON SUIT.

Misjoinder of Causes—Pleading.

Though two distinct causes of action are shown by a petition, one on contract and another on tort, such a misjoinder cannot be taken advantage of by objection thereto in the answer of defendant. To be available as an objection, motion to strike out either contract or tort must be made, and this being the statutory mode for excepting to the misjoinder, which, having been waived by non-exception in the prescribed mode, would be no ground for non-suit ordered by the court. 174

NOTICE.

Surety not required to give notice to payee in note, of his relations to obligor, before he can avail himself of statute of limitations,—vol. 1, 541.

Attachment will not be sustained where attaching creditor had actual notice of assignment before suing out attachment,—vol. 1, 533.

Reservation of legal title in bond, with covenant of warranty, is notice and binding on subsequent purchasers as privies,—vol. 1, 186.

A statement in a deed "that the land herein conveyed is the same property given to my daughter," is notice to subsequent purchasers from her husband,—vol. 1, 546.

A party defendant, presumed to be in court has constructive notice of an amended petition,—vol. 1, 399.

NOTICE—Continued.

Agency—Notice.

Strangers or other persons delivering goods for transportation to R. R. Co., not bound to enquire whether person found at depot, is authorized to accept such goods,—vol. 1, 133.

Adverse Possession—Registration of Deed—Limitation.

Where lapse of time and the statute of limitations are relied on as a bar to an action to recover possession of land the plaintiff will be presumed to have notice of the adverse holding from the time of the registration of the deed. 673

Open and adverse holding after lease expires, authorizes presumption of notice to landlord,—vol. 1, 494.

Notice of Meeting of Processioner—Appearance.

The appearance and entering of objections to some of the acts of the processioners, is held to waive formal notice of the time and place of their meeting. 269

Fraud—Trust.

A party purchasing lands with actual or constructive notice of a trust existing in his vendor, though not of record, acquires no right beyond that held by such vendor, and any attempt to pass an unincumbered title with such notice, would be fraudulent. 359

Divorce—Application for Allowance.

Notice of an application for maintenance is not required, where there is a personal service of the summons. 332

Deposition—Mianomer.

A notice to take depositions was in the name of Greene, appellee, and in the caption, it stated that they are to be used in the case of Green assignee of Sheppard. Held, that it was not sufficient to authorize the court to exclude the depositions. 154

Ejectment—Notice to Tenant—Hostile Possession—Landlord and Tenant.

In an action of ejectment, where a tenant, repudiating his lease and claiming title to the land, changed the possession from a friendly to a hostile holding, it is not necessary for the owner to give notice to vacate the premises. 552

Letters.

For the writer of a letter of introduction thereby to be bound, it is necessary that he be notified that he would be held for any loss occasioned. ..563

Levy—Sufficient Notice to Execution Debtor.

Notice to an execution debtor, of a discharge of a levy, without a bond of idemnity be forthcoming, given at twelve o'clock on the day of sale, held insufficient. 622

Lands and Conveyances—Lis Pendens Purchaser.

One who has been appointed to execute a judgment of court for the sale of land, and which was delayed, and who afterwards purchases the land of one of the contesting litigants in a subsequent suit, is held to be a lis pendens purchaser, with actual notice. 427

Notice to Surrender Possession in Ejectment—Life Tenancy by Parol Agreement.

Appellee, mother of John S. Jones, deceased entered upon and took possession of a house and lot belonging to the estate under a parol agreement with the intestate before he died, that she was to have same as a home during her lifetime, in consideration of services rendered the intestate during his life: Held, that before appellee could be ejected she would be entitled to notice to surrender possession of the premises to the heirs of the intestate. 214

Partition of Payments on Obligation to Joint Owners—Parties.

Where there is a covenant payable to several co-owners of an obligation, the obligor is not bound to partition the payments and see that each gets his part, nor if there should be controversies relative to it, is

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he bound without any notification whatever to have all present when he settles with either; in such cases, if any of the payees intend to withdraw the presumed agency from his co-owners, he might notify the obligor of such intention. 125

Sufficiency of Pleading.

The failure of a defendant to deny the allegation in a petition "that the defendant had been notified for more than months to surrender possession," must be regarded as an admission of legal notice. 219

NOVATION.

A creditor cannot claim novation of contract, where he does not within a reasonable time offer to perform same,—vol. 1, 504.

NUNC PRO TUNC.

Bill of Exceptions—Filing of Same.

A bill of exceptions, filed some four months after an order of court granting leave to file same October 26, 1867, and "time until Saturday next" is given to file a bill of exceptions, on February 29, 1868, leave is given to "withdraw bill of exceptions filed in case No. 1703, and file in this case," and again on March 7, the court granted leave to file same "in this case nunc pro tunc as of November 1867," is held to be too late under any view of the case. 583

OBJECTIONS.

Judgment Constructively Vacated—New Trial without Objection.

On a motion for a new trial, and to set aside a verdict and judgment rendered against appellant, no order appears to have been entered disposing of the motion, and the parties proceeded to try the issues again without regard to the former judgment: Held, that in the absence of objection by the defendant on that ground, the former judgment was constructively vacated by subsequent proceeding, and defendant regarded as having waived his right to said objections on the last trial and judgment. 185

OBLIGOR.

As to distinction of, in note, in relation to obligation of an endorser,—vol. 1, 42.

OCCUPANCY.

Possession by occupancy is constructively co-extensive with defined limits of claim of possession,—vol. 1, 328.

Adverse Possession—Conflicting Occupancy.

Without conflicting occupancy, the long possession by residence under an elder grant, claiming possession and use co-extensively with the entire boundary of a patent, is constructively actual and adverse possession to the same extent. 612

Color of Title—Fraudulent Assignment—Possession of Land Under.

The possession and occupancy of lands under color of title, will give no rights thereunder to the holder of the premises, where the title thus asserted is procured by a fraudulent transfer. 342

OATH.

Informality in the oath administered to arbitrators not sufficient to set aside award,—vol. 1, 349.

OFFICERS.

A subordinate not liable for criminal prosecution by taking property under orders from superior military officer,—vol. 1, 406.

Constable not allowed to collect debts not within the jurisdiction of his court,—vol. 1, 586-91.

OFFICERS—Continued.

Where he goes without his jurisdiction, he is responsible as agent and not as officer,—Ib.

Where constable fails to return an execution for more than thirty days after return day, remedy is by motion or suit on his bond,—vol. 1, 543.

Same,—as to collection on an execution, after demand,—Ib.

Officer tendering resignation to take effect after an election,—vol. 1, 62.

Whether a citizen has been guilty of an offense involving the forfeiture of his right to vote, being a judicial question, cannot be judged collaterally or incidently by the officers of the election,—vol. 1, 100.

Judicial Sales—Lands and Conveyances—Duty of Officer.

It is the duty of an officer, selling land under judgment to satisfy an existing lien thereon, to disclose to the bidders any incumbrance existing other than that for which the sale is being conducted, in order that bidders might fully understand the character of the title they would acquire if they purchased. 321

Judicial Sales, City of Louisville—Officers Discretion.

By Sec. 812, C. C. in the sale of a small portion of real estate in the city of Louisville, and county of Jefferson, if the defendant does not require less than the whole to be sold, where less will produce the debt, the officer making the sale may exercise his discretion, with a view to the interest of the defendant, whether to sell the whole, or less than the whole, as he may or not think it advantageously susceptible of division. When the whole is sold by the officer, under the power here conferred, where the defendants are infants, and the officer must exercise the discretion conferred upon him, by reason of their disability to direct how the sale should be made, the facts should be stated in the return. 321

Notice of Sale without Bond.

If the sheriff has, in good faith, reasonable doubt as to the liability of property to the execution, he has no right to release the levy, without reasonable notice to the execution debtor that he would not sell without a sufficient bond. 622

Pleading—Judgment Creditor—Actions—Officers Negligence.

The effort of a judgment creditor to make his debt by causing another execution to issue, after the sheriff failed to execute former one, will be no defense for the officer to an action against him for his official delinquencies. 352

Sheriffs—Constable—Responsibility.

Sections 4 and 5 of Art. 4, Chap. 20, 1 Revised Statutes page 257, fixing the responsibility of constable, has no application to sheriffs. 672

Failure to Return—Insolvency of Debtor no Excuse—Penalty.

The fact that an execution debtor is insolvent, will absolve an officer from liability for the debt, but it cannot relieve him from the penalty for failure to return the execution. 27

OPTION.**Option of Purchase—Right of Holder to Rescind.**

One who directs an investment in a speculative enterprise must elect the option of purchase within a reasonable time. The conventional reservation of an option to reject the purchase cannot be reasonably interpreted so as to allow him an indefinite time to accept, which would give him the unjust advantage of holding the interest so long as it was in value, and repudiate it if it should depreciate. 582

ORDINANCES.**Street Improvement—Contract with City—Grading and Paving—Curbing no Part of Contract—Abutting Land Owners—Lien.**

Curbing is not included in grading and paving and is as distinct as these are from each other and unless the ordinance authorizes the curbing the city has no right to put it under contract, but if it is done the city and not the lot owner is responsible. 74-75

ORDINANCES—Continued.

Street Improvement—Assessment of Property Covered by Railroad Track.

An amendatory ordinance, requiring the improvement of so much of a street as is not touched by a railroad track, is legal and binding against the property adjacent thereto. 275

OUSTER.

Minority congregation cannot be ousted by the trustees of church property, where abandoned by the majority,—vol. 1, 220.

PARENT AND CHILD.

Insolvent parent may provide reasonable education and maintenance for minor children,—vol. 1, 539.

Fraudulent Assignment of Property to Infant Son.

A deed of gift from a father to his infant son, who had no means, nor where it is shown that he had secured funds with which to pay the consideration stated, the father at the time being heavily involved, is held to be fraudulent and without consideration as to creditors of the father. ...309

Contract.

An alleged contract by parol agreement between father and son, no writing of any kind having ever been made, held too vague for judicial action and unenforceable. 653

Parent and Child.

A conveyance by a father to his son of a valuable estate in consideration of his giving them a support, cannot be enquired into by the other children after the death of the parent, no complaint by them nor the other heirs, having been made during the life of the parents. 587

Gifts—Advancements.

In a suit for restitution by some of the heirs against a son, for distribution of property placed in his hands by the father, each of the heirs entitled to an advancement equal to the largest amount made any one of them during the life of the parent, to be first paid to them out of the whole estate. 587

PAROL AGREEMENT.

Purchase of land by one party, under parol agreement for partnership, though deed made in name of purchaser, held to enure to benefit of co-partner,—vol. 1, 602.

A parol sale and re-delivery of land as part consideration on original purchase lien, held sufficient to entitle credit therefor, and specific execution will lie,—vol. 1, 305.

Extension of Time on Note, Inadmissible as Evidence.

A mere parol agreement to extend the time of payment of a note would be in contradiction of the note itself, and therefore inadmissible. 365

A parol agreement cannot destroy obligatory effect of a note,—vol. 1, 146.

Contracts—Written—Unsigned—Evidence of Parol Agreement.

A written contract, unsigned, may be referred to as containing the agreement between the parties with as much certainty, if not more, than the mere recollection of witnesses, and may be regarded as the establishment of a parol agreement. 128

Parol Lease—Evidence to Sustain a Resulting Lien.

Although a moral sub-lease from the lessee of minors, for the indefinite term of their minority was void, it is available for protecting the sub-lessee's possession as a resulting lien for improvements made by him with the sanction of the lessee and agent of the infants in face of an assurance by them that he might enjoy the possession during said infancy. 141

PAROL ASSIGNMENT.

Parol assignment of note will operate as an equitable transfer of indemnity against loss on endorsement,—vol. 1, 382.

PAROL EVIDENCE.

Not admissible to vary terms or import of writing, unless fraud or mistake charged,—vol. 1, 17.

PARTIES.

Duty of court to have minors brought in as parties to action affecting their rights,—vol. 1, 509.

Waiver of homestead by widow renders it unnecessary to join her as party to action by legatees in suit for settlement,—vol. 1, 482.

All subscribers to stock in insolvent corporation, in liquidation, should be made parties,—vol. 1, 458.

Equity decedent had in land having been sold, his widow and heirs not necessary parties,—vol. 1, 470.

In suit to sell personal estate of insolvent testator for benefit of creditors, heirs not necessary parties,—vol. 1, 28.

Where widow is entitled to equitable dower, she is necessary party in suit to enforce lien on land,—vol. 1, 307.

Where right of action for unpaid consideration would survive to administrator, he is necessary party to suit for specific execution,—vol. 1, 67.

When executor is legatee, he is real party in interest in action on note given testator,—vol. 1, 407.

One claiming property attached, may have himself made party to suit, by petition,—vol. 1, 164.

Petitioner holding only an equitable title, should join legal title holder by proper pleading,—vol. 1, 518.

Decretal Sale—Ostensible and Real Bidders.

Alcorn and Givens having purchased a farm at decretal sale, executed their bond for the purchase price with D. H. Walker as security. Before this sale was confirmed, they sold the land to Montgomery and delivered to him a title bond, reciting that A. Alcorn, and R. H. Givens and D. H. Walker were the parties of the first part. The notes taken for the purchase price were made payable to said Alcorn, Givens and Walker; held, that Alcorn and Givens, by their own acts in giving the bond and receiving said notes furnished strong evidence that Walker was interested and his interest prima facie appearing, his heirs should have been made parties to the suit to foreclose. 313

Decretal sale good, though party complaining has not joined proper parties to suit,—vol. 1, 369, but not good, if legal title holders are left out,—vol. 1, 398.

Land—Judicial Sale to Satisfy Lien.

A petition for the sale of land to satisfy unpaid purchase money must allege and plaintiff must show title in some party before the court, who should not adjudge a sale of the land without an exhibition of title thereto. 328

Lands and Conveyances—Partition—Legal Title Holder—Parties.

Where the legal title to land in contest is in one not a plaintiff nor defendant to the action, he cannot be concluded nor his title passed by the pleadings proof, or judgment to which he was no party. 196

Judgment—Erroneous as to Representatives of a Defendant Intestate When not Before the Court.

A judgment rendered in a suit, in which an intestate was a party thereto, is erroneous, when the representatives of the deceased are not brought before the court. 345

Pleadings.

In a suit to enforce a specific conveyance, for a division of property ordered by a judgment of court. it is proper to join as parties defend-

PARTIES—Continued.

- ant, all persons in possession of the land, by pretended purchase or otherwise. 520
- Sale—Bond for Purchase Money—Pleadings.**
 In a suit to enforce a sale bond of personalty, it is necessary to bring all originally interested parties before the court, that their interest, as appearing, either by enforcement or cancellation of the bond, may be protected. 372
- Vendor's Lien—Answer Must be Made a Cross-Petition.**
 Gudgeall had obtained a judgment at law against Rutherford and filed an answer to the attachment suit asserting a vendor's lien, but he failed to make his answer a cross-petition against Rutherford, nor in any manner made him a party. Held, that the entry of Rutherford's appearance did not make him a party to Gudgeall's answer. 161
- Lien—Purchase Money—Suit to Foreclose—Necessary Parties.**
 Mrs. Jarvis conveyed the legal title to a house and lot, adjudged to be sold, to one M. S. Willis, and upon which F. A. & C. A. Nourse held liens for purchase money, which M. S. Willis undertook to pay as part of the consideration of the purchase. Held, that in a suit to foreclose the lien, the personal representative or heirs-at-law of Mrs. Jarvis were not necessary parties. 319

PATENT.

- Purchase of tangible property by one partner, does not include right to exclusive use of patent belonging to firm,—vol. 1, 309.
- Both partners entitled to use of patent until sold for division,—Ib.

PARTITION.**Lands and Conveyances—Lien.**

Where an estate has been devised and one of the legatees has the use of the property, with the acquiescence of the others, in an action for a partition, the value of the improvements on the land at the time of the death of the intestate, should be ascertained, and one-half charged to the legatee in possession, to be a charge upon the half of the landed estate as may be set apart to them. 349

Land—Agreed Time—Long Acquiescence—Mistake.

Where the owners of land agree upon a partition line and each occupy their respective parcels up to that line for a long time by themselves and vendees, a court of equity will not disturb it, although there might have been a mistake in the written evidence of the partition. 29

Presumption as to execution of deeds, where partition made of lands and acquiesced in for 28 years,—vol. 1, 74.

Notice—Partition of Payments on Obligation to Joint Owners—Parties.

Where there is a covenant payable to several co-owners of an obligation, the obligor is not bound to partition the payments and see that each gets his part, nor if there should be controversies relative to it, is he bound without any modification whatever to have all present when he settles with either; in such cases, if any of the payees intend to withdraw the presumed agency from his co-owners, he might notify the obligor of such intention. 125

PARTNERSHIP.

Books kept by partnership evidence between the parties,—vol. 1, 277.

In the absence of agreement or memorandum, partners in purchase of lands, held to have equal interest,—vol. 1, 427.

In settlement of partnership sales of land, interest of junior partner should be valued as of the date of the last sale made, and interest charged senior up to said date,—vol. 1, 430.

Junior partner would hold lien on senior's interest for amount due him,—Ib.

As to authority of one partner to bind another,—vol. 1, 168.

PARTNERSHIP—Continued.

Purchase of land by one partner, under parol agreement for partnership, though deed made in name of purchaser will enure to benefit of co-partner,—vol. 1, 602.

Presumption as to payment for partnership purchase out of funds belonging thereto,—vol. 1, 522.

Partnership actions should be brought in equity court,—vol. 1, 452.

Purchase of tangible property by one partner of the other, does not include right to use patent belonging to firm,—vol. 1, 309.

Both partners have right to use patent until sold,—Ib.

Duty of surviving partner, in settlement of partnership accounts,—vol. 1, 496.

A counter-claim may be set up by one partner, after judgment has been rendered against the other by default,—vol. 1, 411.

Partnership Contract—Fees for Services Claimed by One Partner.

By the terms of a co-partnership, one was to advance the funds necessary to conduct the business and the other to perform the services, profits, if any, to be equally divided. Afterwards, an express agreement was entered into to borrow money to make a larger investment: Held that this latter agreement would not change the original contract, unless there was a special agreement made and entered into, to allow fees for services rendered the firm, the presumption being that partners look to the profits for their compensation. 58

Profits—Proof as to, etc.

In the absence of definite proof as to the specific purchase price of horses for a partnership, which had been formed to furnish horses to the Government, it is sufficient to average the whole upon a basis of what the evidence shows was paid for a portion of the stock. 486

Disclosing Name of Individual Parties.

Unless the real names of the individual partners to a partnership are disclosed, the creditors will be presumed to have supposed the business was owned by those in control of, and who conducted same, as their individual place of business. 319

Discontinuance by Acquiescence in Other Dealings.

The acquiescence of one partner in acts by the other, which conduced to prove a dissolution of a former partnership, will bar any recovery of a share of profits made in all transactions subsequent to the alleged dissolution. 486

Silent Partner—Abuse of Confidence and Trust.

Allison and Bush, appellee, were friends, and business associates in the banking business. Bush and Shivell, appellees, were law partners; Shivell and Allison, each owned a share in a mining enterprise, and Bush was the silent interested partner in the share of each. Bush persuaded Allison to buy another share, engaged to negotiate the purchase and promised to secured it at cost, to Allison. Bush and Shivell bought a share of Bright for \$500 and had it transferred to Shivell, who transferred to Allison. Bush then informed Allison a share had been bought for him. Bush and Shivell then bought a share from another party, for \$1,500, no payment being made on same. Appellees made draft on appellant for "purchase money for the Bright interest," etc., and the \$1,500 was paid. In a suit to recover \$1,000, held that the transaction was a combined abuse of confidence and trust, and appellant entitled to restitution of the difference in price of the two shares. 472

PERPETUITIES.**Wills—Construction—Restrictions Imposed.**

A devise under a will to the wife that she should have the sole control of every specie of the estate, to give to whom and when she pleases, during her natural life, and after her decease, every specie of property that could be found to be equally divided between the children, is held not to vest

PERPETUITIES—Continued.

the wife with the fee simple title thereto, that she may dispose of the estate to one of the heirs to the exclusion of all others. 418

PERSONAL INJURY.**Negligence—Careless Driving on Streets—Infants.**

F. Roberts, while driving rapidly through the streets of Louisville, ran over, and materially injured a child of some four years of age. The accident occurred at the curbing, where the child was seen to be trying to get up, when the buggy of Roberts ran over it. His attention was called to the child being ahead of him and in the street, but did not slow up or turn his horse so as to avoid the wheels of the buggy running up against the curbing, at the point where the child was seen to be clamoring up: Held, to be contributory negligence by Roberts, and liable for personal damages sustained by the infant. 272

PAYMENT.

Payment by Administrator, with full knowledge of what was in his hands,—vol. 1, 165.

Where lands and personal property both sold on same terms, and notes executed for aggregate amount, a payment thereon should be pro rated, as to the land and personal property,—vol. 1, 86.

Married women entitled to amount of payment she made on lands of her insolvent husband,—vol. 1, 449.

As to covenant to extend time of payment at pleasure of obligor,—vol. 1, 491.

Duty of vendee to apply deferred payments to extinguishment of prior mortgage, though vendor executed bond,—vol. 1, 472.

Where a payment made on a mortgage, is without date, it will take effect as of the due date of the mortgage,—vol. 1, 344.

Presumption of payment out of partnership funds, where partners agree to purchase lands jointly,—vol. 1, 522.

A surety cannot have judgment against his principal until payment by him of the debt,—vol. 1, 458.

Grantee giving note in bank with grantor as endorser, does not discharge vendor's lien, until grantor is released as endorser,—vol. 1, 118.

Statute of Limitations—Bills and Notes—Presumptive Evidence of Payment.

Lapse of time cannot operate as a statutory bar to an action on a note, its only legal effect being presumptive evidence of payment as pleaded. A payment not pleaded, cannot be presumed. 560

Deeds—Payment.

The acknowledgment of payment in a deed of conveyance cannot be held to be conclusive, but is subject to be rebutted. 587

Liability of Drawer, Where Funds of Company Come into His Hands.

It is the duty of an officer of a corporation, who had given his payee an order on the treasurer, and accepted, payable out of a certain fund, to set aside so much thereof as is necessary to liquidate same, when said certain funds come into his hands as such officer. 658

Detinue—Action for Recovery of Money Had and Received.

A payment by a father for necessities for the family of his daughter out of funds placed in his hands by her husband, it not a good defense to an action for the recovery of the amount by the daughter's husband....538

PERSONAL PROPERTY.

"All my personal property, consisting of all the stock of horses, cattle, sheep and hogs," and "all farming utensils of every kind and description, except such as is exempt by law from execution." Held not to convey all personal property of mortgagor,—vol. 1, 511.

Same—The words "consisting of" held to cover only such personal property as mentioned specifically in the instrument,—Ib.

PERSONAL PROPERTY—Continued.

Adverse Holding.

The adverse holding of personal property for a period of five years give a perfect legal title. 66

Contract of Sale—Binding Consideration.

A purchaser of personal property in which there is a remainder life interest to others, known to him at the time, though the sale be attempted absolute with general warranty, is held to be estopped from denying liability on a note given for the purchase price, his purchase of the life estate being held to be a binding consideration. 596

Use of Property by Husband After Wife's Death.

The retention and use of the personal property of the wife, by the husband, after her death, will imply a promise to make a reasonable compensation therefor. 467

Slaves—Contract for Hire.

The principle is well established that the hirer of a slave for a particular term is not exonerated from his obligation to pay the price by the death, escape or abduction of the slave. 98

Possession.

The possession of personal property is prima facie evidence of ownership which would entitle the party so possessed to maintain an action against whoever may deprive him of his possession (also vol. 1, 93). 155

Warranty—Limitation.

Where personal property is retained for five years, without complaint, if there was a warranty at the time of the sale of same, the law presumes that the property was as warranted to be. 388

Sale of Personal Property—Warranty of Title—Possession.

No cause of action accrues on a warranty of title to personal property, until it is taken from the purchaser by the real owner, and unless a defendant alleges that some one had asserted a title to the property, or that his possession had been disturbed, he could not show a breach of warranty. 395

PETITION.

Petition must allege value of property charged to be in hands of defendant, also annual rents and profits,—vol. 1, 192.

As to slight variation in answer, not traversing allegations of petition,—vol. 1, 635.

An answer of denial, filed to an original petition, should be taken as traversing more specific averments of an amended petition,—vol. 1, 516.

Where a petition fully sets out and alleges title and possession, in a suit to quiet title to land, it is a sufficient compliance with act of legislature, March 9, 1854,—vol. 1, 418.

Facts which a plaintiff believes a witness would prove, must be alleged in a petition for new trial,—vol. 1, 537.

Allegations of Petition—Customs and Usages—Uniformity a First Requisite to Constitute.

Uniformity being the first requisite in the establishment of law by custom, a petition that alleges in substance that, in the case of furnishing a steamboat with goods and supplies for speculation by parties thereto, or to produce freight for the boat, that in all cases steamboat men, merchants and others at Paducah, Ky., and up the Tennessee river, regard the boat liable for such debts, and that it has been so long acquiesced in that it has become a well established usage, and that it is a valid custom is held not sufficient to establish that the custom was uniform and general. 390

Pleading—Attachment.

After issue made and trial begun upon the merits of a case, it is too late for an objection to the petition or attachment for want of verification. .183

PETITION—Continued.

Attorney and Client—Relation—Dealings—Constructive Fraud—Burden of Proof—Petition Need Not Allege Fraud.

The law not only watches over the transaction between attorney and client, but it often interposes to declare such transactions void. On the other hand, dealings between them are not necessarily void, but the burden of establishing perfect fairness, adequacy and equity is thrown upon the attorney and it is not necessary for the client to allege in his petition that the transaction was fraudulent. 40

Attorney's Fee—Two Causes in One Petition.

Where two causes of action are joined in one petition, only one attorney fee can be taxed against the defendant. 211

Bills of Exchange—Pleading—Petition—Demurrer.

In a suit on a promissory note or bill of exchange, and the petition does not aver protest, and notice, either for non-acceptance or non-payment nor aver any excuse as that the drawer had no funds with, or authority from the drawer to draw upon him, the petition is subject to a general demurrer. 271

Pleading—Bills and Notes—Allegations in Petition.

It a suit on a note, the possession of same by the plaintiff and filing it with the petition, is sufficient to authorize a recovery of the amount due on same, although no distinct averments are made in the petition that the note had been transferred by delivery to plaintiff, together with an affidavit that it was just and due and that he ought to recover the amount of same. 261

Contracts—Specific Execution—Defective.

In a suit to enforce the specific execution of a contract the plaintiff must allege ability and readiness to convey the land in controversy to his vendee. 71

Pleadings—Amended Petition—Limitation.

Limitation does not run against an amended petition which only supplies a defect in the original, as the original was not barred by time. 100

Judgment Against a Non-Resident—Pleadings—Essentials of Petition.

As a petition, against a non-resident, averring a readiness to convey lands sold to defendant, stands traversed, it is essential to recovery that the plaintiff show he possesses an unencumbered legal title, and a tender of such a deed made in court. 629

It is error to adjudge a sale of a defendant, non-resident's property, where the allegations of the petition neither allege nor seeks to point out the interest the defendant holds in the property, nor such title shown in the judgment. 629

Pleadings—Defective Petition Cured by Subsequent Pleadings and Exhibits.

The facts set out in the defendants' answer and cross-petition, together with the title bond filed therewith, clearly shows that there was a vendor's lien as to all the notes. Held, that the defect in the original petition was thereby cured, at least after judgment. 669

Pleading—Sufficiency of Allegations in Petition.

A petition for an injunction against the enforcement of a judgment obtained by default, which shows that the plaintiff was negligent in answering a former suit and allowed judgment to go against him, examined and held insufficient as a defense, either at law or equity. 506

PHYSICAL RESTRAINT.

Redemption—Mental Disability—Excuse for Non-Tender.

Physical restraint and mental disability is an equitable excuse for not making a precise tender for redemption and a court of equity will require one to surrender this advantage and accept the amount to which he is legally entitled. 73

PLEADING.

Where personal acts of defendant are alleged and relied upon, he cannot set up want of knowledge or information to form belief as to their existence as defense,—vol. 1, 71.

Where petition sets forth sufficient grounds for attachment, not necessary that same thing be verified in separate affidavit,—vol. 1, 576.

A petition setting forth an answer prepared to be filed, but not the petition on which default judgment rendered, held, not good,—vol. 1, 90.

Grounds in an amended petition inconsistent with the original,—vol. 1, 559.

A wife cannot verify pleading for her husband, unless she states she is his agent,—vol. 1, 128.

Allegations as to fraudulent conveyance, must state in what the fraud consist,—vol. 1, 335.

Same, in attachment proceedings,—vol. 1, 444.

In a suit for settlement of a trust, defendant's answer must allege that real estate conveyed in the trust was the same as conveyed in deed, reserving lien,—vol. 1, 86.

To have specific execution of contract, it is essential to aver payment of the consideration,—vol. 1, 66.

Where purchaser seeks to coerce title, payment of the purchase price must be averred,—vol. 1, 118.

Not necessary to plead usury, where statute declares all contracts for more than legal interest, void,—vol. 1, 77-448.

Facts Alleged in Petition not Controverted, Taken as Confessed.

A petition, on an account, charging rents upon land, for a stated period, imports an allegation that the lands were used for the time as charged and an answer which does not controvert this fact, is properly treated by the court as an admission, and an instruction predicated on this view is not erroneous. 56

Judgment by Default—Sufficiency of Petition—Administrator—Action Against.

A petition was filed against the sureties on a constable's bond, and against the administrator of the deceased constable, for failure to pay over money collected on claims put in his hands for collection as constable. No defense was made to the action, and a personal judgment was rendered against the administrator and the two sureties. Held, that without allegation or proof that any assets came into the hands of the administrator, it was erroneous to render a judgment against him, and even with such proof the judgment against him could be only for the debt, interest and costs to be levied of assets in his hands to be administered. 187

Allowance for Disposition of Trust Funds Without Allegation in Petition.

An allowance by a commissioner of a credit for administration of the principal of a trust fund, against the account due the residuary legatee thereof, without necessary allegations in a cross-petition by an adverse party, that said fund should be charged against said devisee, is radically erroneous. 344

Answer.

A defendant may set forth as many grounds of defense as he may have, and court may permit amended answer to be filed embodying others discovered,—vol. 1, 620.

Facts not specifically alleged in an answer, need not be denied.

Before judgment can be rendered on an answer, it must be made a cross-petition,—vol. 1, 203.

An answer to a petition against captain of a boat is not good, unless it alleges that defendants were not the owners of the boat and did not control it,—vol. 1, 81-99.

Bill of Exchange—Limitation—Subsequent Promise Must Be Alleged.

When an action on a bill of exchange is barred by limitation, which is pleaded, and a subsequent promise to pay is relied on it must be alleged,

PLEADING—Continued.

- and the statement that one deems himself bound for the debt cannot be construed to be an unconditional promise to pay. 79
- When Answer of One Defendant Not the Answer of All.**
The joint answer of all defendants to an action, sufficient as a plea of duress on the part of one of said defendants, does not present that defense as a bar to the action as against the other defendants who seek to avoid an obligation on the ground of a false representations of plaintiff in the procurement of their signature to a note. 67
- Amended Answer After Evidence Closed.**
A defendant may, after the evidence is all closed, amend his answer so as to conform to the proof. 325
- Failure to Answer Allegation in Petition.**
The failure to deny the charge in a petition, of a deed having been given for land (and last, admit its correctness), will act as a bar to a denial of a continuous chain of title, in a subsequent suit. 647
- Answer—Plea in Bar-Replication.**
An answer alleging that by an oral stipulation (inconsistent with the as, under the provisions of the Civil Code, the plea stood denied except so far as confessed by the statements of the petition. 554
- Answer—Variance Between Allegations and Written Contract.**
An answer, alleging that by an oral stipulation (inconsistent with the written memorial of the contract sued on), the sale was to be void if the owners of a remainder should refuse to relinquish their interest, without proof of fraud or mistake in the written contract, is inadmissible. 596
- Answer, When Not Required to Be Denied Under Oath—Written Instruments Filed.**
Where in an answer a receipt is referred to as having been duly signed by the plaintiff, it must be filed with the pleadings in order to require the plaintiff to a denial of same under oath. The averment in the answer that it was executed, is not sufficient. 604
- Contract for Building Court-house—County Judge as Contractor.**
In a suit by a county judge for payment of work for erection of court-house, and it is not shown that he was prohibited from bidding, nor the pleadings show that he derived any advantage from his official position, nor anything unfair in awarding the contract, nor a more advantageous one could have been made with others, an answer failing thus to make a good defense, was properly refused. 439
In suit on contract, petition must show acceptance on a letter, if that be relied on,—vol. 1, 167.
- Contracts—Sale of Land—Suit to Enforce—Petition to Be Made Party—Statement of Facts.**
In this suit for enforcing a contract for the sale of land appellants filed a petition to be made parties, alleging they were the "owners of the land and interested parties." No facts were stated showing the character of their claim, or how it was derived, whether from devise, contract or inheritance. Held, that each claim is too vague and indefinite for judicial review, and the cross-petition was properly dismissed. 135
- Cross-Petition.**
Where a cross-petition and counter-claim depend on the facts stated in the answer to original petition, held that those facts showing imposture and entire want of title either legal or equitable, are admitted by the failure to respond to the allegations specifically, as required by the Code. 661
- Time of Filing Answer and Cross-Petition.**
A pleading filed as an answer and cross-petition after the final decision of the Appellate Court, and before the mandate had been entered in the circuit court, could not be admitted as an answer, and as a petition for review, it is premature until the mandate had been entered. 543

PLEADING—Continued.

Amended Cross-Petition, Offer to File.

Allegations of fraud, in a cross-petition, and of the payment of a portion of the mortgage, in litigation, uncontroverted in that there was a mere motion to reject the filing of same, which was sustained, presented a prima facie case for relief, and it was error for the court to reject the amended cross-petition as offered. 263

Demurrer—Defense to Action on Note.

Where the facts, in an answer to a suit on a note, show it to have been given in consideration of a half interest in a business, and that the plaintiff had made no settlement of the partnership affairs, which was in liquidation, it is sufficient to constitute a good defense, and a demurrer thereto should be overruled. 562

Demurrer—Allegations in Answer Taken as True.

A demurrer to an answer to a petition that alleges the acceptance by plaintiff of new notes with security, in settlement of those sued on, and which were secured by a mortgage, should be over-ruled as it is an admission of the facts as alleged in the answer. 476

Fraud—Collusion.

In the absence of allegation and proof in a petition to coerce payment of an obligation to co-owners, of fraud and collusion, and notice from all to the obligator, a settlement of the obligation with one of the co-owners will not be disturbed. 125

Jurisdiction of Circuit Court and Quarterly Courts of Amounts Less Than \$50.

A petition alleging an indebtedness of \$71 was filed in the circuit court, amount due on a promissory note alleged to have been lost and in the progress of the trial an amended petition was filed, stating that the note was entitled to a credit of \$35. Held, that the court did not err in sustaining a motion to dismiss the cause for want of jurisdiction, and in determining the question of jurisdiction the amended pleading should be regarded as qualifying and correcting the original petition, since the question of jurisdiction must be determined by the plaintiff's own assertion of his claim and not by the defense of his adversary. 117

Jurisdiction of Courts Over Property Not in Controversy.

The circuit court has no right to assume jurisdiction over land not embraced in the petition, nor the appointing of a commission to ascertain the rents, profits, etc., due from a defendant in possession, until an amended pleading shall have been filed charging the defendant with the use and occupation of the land. 170

Judgment by Default—Surety.

In a suit for a devastavit the petition neither alleges the amount of assets nor its sufficiency to pay off the debts sued for, but leaves the amount blank and refers to the appraisal and sale bills to show its sufficiency. Neither of these documents were filed as exhibits. Held, that a judgment by default against the surety, the only party served with a summons, was void. 143

Misjoinder of Causes—Non-Suit.

Though two distinct causes of action are shown by a petition, one on contract and another on tort, such a misjoinder cannot be taken advantage of by objection thereto in the answer of defendant. Motion must be made to strike out, either the contract or tort. 174

Notice—Sufficiency of Pleading.

The failure of a defendant to deny the allegation in a petition "that the defendant had been notified for more than months to surrender possession," must be regarded as an admission of legal notice. 219

Conveyance to Prefer Creditors—Failure to File Suit in Time.

A petition which alleges ability and readiness to convey land and states how title is derived, which is not an impossibility, is good, when unanswered. 78

PLEADING—Continued.

Petition—Mortgage Exhibits—Rule to File—New Trial.

When a petition discloses the existence of a mortgage and proposes to file it, it is in the power of the defendant to compel the plaintiff to do so, but if he fails to exercise this right, or to interpose any other objection to the judgment in the circuit court, the irregularity is not a cause for reversal. 81

Settlement of Accounts—Failure to Assert in Petition—Evidence.

The failure of a plaintiff to allege in his petition to coerce a settlement agreed upon between the litigants, that such a settlement had been made, will debar the introduction of evidence in regard thereto. And the failure to assert the settlement is conclusive of its non-existence. 403

Petition, Allegations as to Ownership of Land.

The allegation that the property was Mrs. Stewart's and that she exchanged her property for it, are the mere conclusion of the pleader, the character of property, whether real or personal, and the manner in which she derived title to it, should have been set forth, so as to enable the court to decide from the facts alleged whose property it was. 217

Petition on Merchant's Account—Price of Goods—Agreement.

The allegations, in a petition on a merchant's account, that the debtor is indebted to him in the sum of fifty-five dollars for goods and merchandise sold and delivered by the plaintiff to the defendant, the particulars of which are set out in an account filed therewith, imparts prima facie, that the price had also been agreed upon or that they were reasonably worth it, and must be deemed setting out a cause of action. 670

Defective Petition—Suit to Enforce Payment for License as Coffee House Keeper—Liquors.

In a suit to enforce payment for a license to sell liquor, the allegations in the petition must show that the town trustees had the lawful authority to require of defendant the sum alleged owing for the license, and the defendant had promised to pay therefor. 463

Petition—Written Instruments.

To constitute a cause of action, it is necessary in a petition to allege that a letter of introduction, saying the party was a "clever gentleman," was written with a fraudulent intent, and that it was held as guaranty for the debt contracted thereunder. 563

Sufficiency of Petition—Suit on Written Instrument.

It is essential to entitle a plaintiff to relief that he should set forth in his petition, if he sues on a writing, the covenants, of the defendants, and the breach for which he seeks redress, and the writing or a copy should be filed and made part of the petition. 105

Defective Petition Cured by Necessary Facts Stated in Answer—Cause of Action.

Where a petition is not good for failure to set forth with certainty the particular execution a sheriff had in his hands, of a replevy of property thereunder, failure to take sufficient surety in the bond, etc., it is cured by an answer that specifically describes all the details in connection therewith, and the petition and answer together, will be sufficient to constitute a cause of action. 352

Contracts—Verbal Agreement to Cultivate Farm.

In a suit for recovery of amount due under verbal contract to manage a farm, and "if the sum of \$1,000 is not made annually, the deficit to be made up by the owner," it must be alleged in the petition that this particular amount was not realized, and show in what the discrepancy will consist, in order to recover thereon. 285

Petition, to enforce judgment against fraudulent grantee in void deed, must show facts which constitute cause of action against grantor,—vol. 1, 230.

Allegations, of value or of amount of damage not considered as true by failure to controvert them,—vol. 1, 347.

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Pleadings that do not appraise defendant of the real cause of action will be dismissed,—vol. 1, 230.

No alteration of cause of action by pleading or proof should be allowed after submission, without notice,—vol. 1, 484.

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Slander—Excessive Verdict—Passion or Prejudice.

In an action for slander, which was exceedingly aggravated, a verdict of \$8,000 for damages, held to be not so flagrantly excessive as to indicate passion or prejudice. 566

POSSESSION.

Land—Title—Unrecorded Deed.

A party in actual possession, holding under an unrecorded deed, has a superior title to one claiming under a subsequent deed, which has been recorded. 401

Personal Property.

The possession of personal property is prima facie evidence of ownership which would entitle the party so possessed to maintain an action against whoever may deprive him of his possession. 155

Sale of Personal Property—Warranty of Title.

No cause of action accrues on a warranty of title to personal property, until it is taken from the purchaser by the real owner, and unless a defendant alleges that some one had asserted a title to the property, or that his possession had been disturbed, he could not show a breach of warranty. 395

Vendee in Possession—Time to Perfect Title.

When a vendee is in the undisputed possession of lands, equity requires him to wait a reasonable time for obtaining an assured title. 376

Note.

Possession of a note is prima facie evidence of ownership,—vol. 1, 240.

In a gift of personal property to the full extent of the boundary expressed in deed,—vol. 1, 156.

Deed.

Possession of property to the full extent of the boundary expressed in deed,—vol. 1, 156.

Error for commissioner to place purchaser in possession of property at decretal sale,—vol. 1, 520.

POWER OF ATTORNEY.

A letter from grantor, properly authenticated, dated prior to a deed subsequent thereto, confers full power on agent to make transfer,—vol. 1, 75.

Estoppel—Sale of Property.

A sale of property by one holding a power of attorney, though voidable on the ground of fraud by the vendor, is binding on him who makes the sale under the power of attorney, where it is shown that the sale was made, upon the agreement that the property was to be re-deeded to him.....506

PRINCIPAL AND AGENT.

Debtor and Creditor—Debts Purchased by Agent—Participation in Fraud—Equity Will Not Relieve.

Equity will not relieve a debtor from the payment of debts purchased by his agent, where he has participated in the fraud committed on his creditors by his agent. 26

Evidence—Competency of Agent as Witness.

A contract for the purchase of tobacco, being in the name of the agent, without disclosing his agency, or the name of his principal, though it would render the agent personally responsible, it would not exempt his principal from liability. 166

PRINCIPAL AND AGENT—Continued.

Attachment of Funds in Hands of Agent—Right to Retain Fund for Indemnity.

An agent has an equitable right to retain the funds of his principal for indemnity and to enjoin any appropriation of it by the attaching creditors. 672

Principal can recover of his agent difference in price for which goods sold, and that reported to him at which sale could be made,—vol. 1, 216.

Authority of agent, is a question of fact for the jury,—vol. 1, 228.

Where agent loans money for his principal at usurious rate, taking notes in his own name, and transferring to principal, usury will be purged,—vol. 1, 282.

PRINCIPAL AND SURETY.

Liability on Guardian's bond, executed in county court, for proper disposition of funds,—vol. 1, 224.

Ward not bound to join county court sureties jointly with sureties in circuit court bond,—vol. 1, 224.

It is no defense to a note by a surety that the obligee promised to secure other sureties thereto,—vol. 1, 146.

Same, but he may proceed against the obligee by counter-claim for damages thus sustained,—*Id.*

The appearance of a party in court, and release on his own recognizance, releases sureties from any further obligations,—vol. 1, 362.

A surety cannot have judgment against his principal before payment of liability,—vol. 1, 458.

The statute of limitations will run in favor of a surety,—vol. 1, 412.

Payment by administrator to county court's receiver of funds in his hands, exonerates sureties,—vol. 1, 498.

Surety in a married woman's bond is responsible, though ineffectual as to her,—vol. 1, 634.

Agreement for Delay Between the Principal Debtor and Creditor—Release of Surety.

An agreement for delay between the principal debtor and creditor, will not exonerate the surety, unless it be a binding agreement, founded on a sufficient consideration, which may be enforced to the detriment of the surety by suspending the right of action and thereby obstructing his legal or equitable rights. 495-365

Partial Payment.

The partial payment by a debtor of another debt due his creditor, is held not sufficient consideration to uphold an agreement for an extension on another debt, as to release a surety on same; this not being a new consideration, but a compliance with that he was already legally required to do. 495

Bills and Notes—Co-Sureties—Presumptive Notice.

C. J. Taylor and Merrill were principals in a note given by them for borrowed money while they were partners in business. A new note was given by them in lieu of the old one, signed C. J. Taylor, and Merrill, "surety." S. P. and J. S. Taylor also signed the last note as sureties. Held, that the word "surety" after the name of Merrill may have been presumptive notice to the other parties, of the character in which he assumed to bind himself, this would not make him the co-surety of S. P. and J. S. Taylor unless he had ceased to stand, as between him and C. J. Taylor, in the attitude of principal in the original debt. 576

Judgment in Favor of Sureties—Sureties' Right to Collect Debt.

A judgment against the principal in favor of the sureties on his bond, who had not paid the debt, should be for the payment of the amount to the holders of the unpaid debt; the sureties have no right to collect the money. 161

Judgment by Default—Pleading.

In a suit for devastavit the petition neither alleges the amount of assets

PRINCIPAL AND SURETY—Continued.

- nor its sufficiency to pay off the debts sued for, but leaves the amount blank and refers to the appraisal and sale bills to show its sufficiency. Neither of these documents were filed as exhibits. Held, that a judgment by default against the surety, the only party served with a summons, was void. 143
- Judgment Against Principal Alone—Erroneous.**
In a suit on a guardian's bond, a judgment against the principal alone, is erroneous. It should be against the principal and his sureties. 490
- Void Judgments—Not Available to Sureties on Bond.**
Sureties on a bond, executed for the payment of property, sold under judgment against infants, cannot be heard to complain of its regularity as to the service upon the minors or their answer by guardian ad litem. 361
- Principal and Surety—Other Names—Principal Sureties' Agent—Bond—Delivery—Fraudulent Combination.**
If the sureties in a bond shall see proper to trust their principal as their agent to get other names and to deliver the bond to the obligee they will be bound by his acts, unless they can show a fraudulent combination with the obligee; the bare knowledge of the latter is not sufficient. 31
- Purchase Money Lien—Judgment Enjoined does not Destroy Lien—Surety on Injunction Bond—Subrogation.**
Where a surety on an injunction bond is required to pay judgments rendered for purchase money on land, and others seek a sale of the land for subsequent claims thereon, the surety, by subrogation, becomes entitled to the prior lien for purchase money, it being held that the judgment did not destroy the lien. 106
- Sureties on Bond—Liability for Default of Sheriff.**
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- Bond—Construction of its Sufficiency—Release of Surety—Right of Wards to Sue Guardian or One or More of the Sureties.**
A bond that does not show the name of the guardian, ward or surety, though signed by guardian and his surety, is held not to be a sufficient bond as is required by statute, or sufficient as an indemnity to a former surety who makes demand for new security, and will therefore not release the former surety. 202
- Guardian's Bond—Counter Security—Right of County Court to Release.**
When it is required of a guardian, and he gives his surety counter-security it may be proper and the county court might be authorized to release the surety requiring the counter security of the guardian. But until such requirement is complied with the court has no authority to release any surety. 202
- Criminal Law—Indictment—Offence of a Breach of Tavern Bond.**
A surety on the bond of tavern keepers cannot be prosecuted under is not subject to indictment; he can only be proceeded against under an indictment alleging an "offense of a breach of tavern bond." A surety a civil action. 543
- Duty of Surety to Discharge Debt—Right to be Subrogated.**
The mere delay on the part of the creditor to collect his debt, will not discharge the surety, unless within the statute of limitations. It being the duty of the surety to see that the obligation is discharged, he must do so, and can proceed against his principal, or be subrogated to the rights of the creditors. 365
- Execution plaintiff not bound to take extreme remedies to recover of a principal, in order to protect the surety,—vol. 1, 484.**
When trustees of jury fund, without order from court, file second bond, held to be a renewal in entirety,—vol. 1, 238.
- A surety on an original bound in county court is released, when a new bound is made on appeal to circuit court,—vol. 1, 25.**
Where one of a number of sureties fails to join others in requiring

PRINCIPAL AND SURETY—Continued.

counter security, he is equally bound with sureties in new bond,—vol. 1, 513.

PROCESS.

Where a sheriff levies an execution on property before the return day, he may sell it afterwards without a venditioni exponas,—vol. 1, 611.

Where purchaser releases a sale under a legal levy, a subsequent issuance of a venditioni exponas and sale, is void,—vol. 1, 413.

Appearance is entered by appeal from judgment rendered on constructive service of process,—vol. 1, 228.

Before dissolution of injunction on a petition can be revived, defendant must obtain order from lower court to stay proceedings, pending appeal,—vol. 1, 623.

A pro confesso void until process served on all defendants to action,—vol. 1, 230.

A defendant on whom process served cannot assume judgment would not be rendered until process served on his co-defendant,—vol. 1, 411.

Trial—Parties to Suit—Summons.

In actions by equitable proceedings plaintiff shall be entitled to a trial at first term after summons has been served on all the defendants, as provided by section 137 and section 395 C. C., where no issue of fact is made by the pleadings, or where the plaintiff consents that the statements in the answer may be taken as true. The service of process on one of the defendants and judgment thereon is error, other co-defendants not having been summoned. 53

Supplemental Pleadings—Mandate of Appellate Court—Relief from on Grounds not Litigated—Judgment.

After the mandate of the Appellate Court shall have been entered and final judgment rendered by the trial judge in the court below, said judgment may be stayed by supplementary pleadings if the grounds for relief show in the allegations, matters not litigated. But the court cannot allow such proceedings to be begun before the mandate shall be entered or accept such pleadings in lieu thereof. 240

Infants—Service of Summons On.

Where the defendant is an infant under the age of 14 years, the service must be on him and his father or guardian if to be found, if not then upon his mother or any other person having the care or control of him. When the infant is over 14 years it must be served on him. 85

Cross-Petition.

Where a party is made defendant to the original action by amended pleadings, process on his cross-petition against the plaintiff is not necessary. 71

PROOF.

Assertions made in answer in another case does not operate as an estoppel so as to conclude all explanatory proof to the contrary,—vol. 1, 567.

It is not sufficient to prove that goods were stolen but must prove that the accused knew of the fact,—vol. 1, 22.

Admissions in an answer cannot be changed by proof,—vol. 1, 356.

Defendant must prove allegations in answer of a partial defense,—vol. 1, 193-248-285-583-522.

Actions—Failure to Prosecute Suit—Damages—Sufficient Evidence—Breach of Bond.

In an action in equity on the bond of the plaintiff in a replevin suit for his failure to prosecute same, the loss the defendant therein might have sustained for a breach of the bond was a subject of proof, and he must show that he had been deprived of his property, and the extent of the loss therefrom by proving the value of the property replevied. A mere judgment for the face of the bond, for the alleged breach, is not sufficient.

PROOF—Continued.

Equity—Error in Accounts Stated, Corrected—Duty of Party Alleging Error to Prove it.

Where there is a written agreement showing a settlement of accounts between parties, the onus devolves upon the party alleging mistakes therein, and until they are shown to exist, the writing must prevail, and it is not sufficient to show that the parties had other dealings and various transactions prior to the date of the writing, but it devolves on the one complaining to show that payments made prior thereto, were not settled and were omitted by mistake. 254

Fraudulent Conveyance—Participation by Vendees.

In the absence of proof of knowledge of or participation in a conveyance of land by a defendant, by the vendees, held, not to constitute a fraud upon any creditor, especially where no proof is offered as to the insolvency of the defendant at the time of the transfer. 525

Partnership—Profits—Proof as to, etc.

In the absence of definite proof as to the specific purchase price of horses for a partnership, which had been formed to furnish horses to the Government, it is sufficient to average the whole upon a basis of what the evidence shows was paid for a portion of the stock. 486

Patent—Large Surplus.

A large surplus is not per se proof of a substantial deviation from the original survey. 137

Wills—Revocation—Writing Must be Executed.

A paper cannot be regarded as a revocation of a will previously made, unless it was in fact a will or codocil, or a writing declaring an intention to revoke the former will, and executed in the manner in which a will is required to be executed, and that without proof of the contents of the paper, it could not constitute a valid revocation in either of those forms. 288

Wills—Distinction—Proof of Contents.

Where a will has been destroyed by the burning of the clerk's office its contents may be satisfactorily established by competent evidence....64

PROPERTY.

Chancellor should mature legal title before property is ordered sold,—vol. 1, 518.

Where trustee sells property with knowledge and consent of beneficiary, purchaser acquires an absolute indefeasible title,—vol. 1, 20.

It is error to subject property purchased jointly, to the debts of one of the parties solely,—vol. 1, 335.

Where there is no value fixed upon property by witnesses, it is error to leave the assessing of such value to the jury,—vol. 1, 11.

One cannot legally sell or convey property to which he had no title,—vol. 1, 250.

An order for confiscation of property must be produced as a defense, if sought to be available as justification,—vol. 1, 177.

Public office cannot be subject of private property,—vol. 1, 318.

An incumbent in office has the vested right in the compensation already earned, which may be regarded as property, of which he cannot be deprived,—vol. 1, 318.

A testator is presumed to have died intestate as to particular property not specifically alluded to by will,—vol. 1, 325.

A purchase of the interest of a payee in a note becomes invested with the equitable title, and is subrogated to the rights of the payee,—vol. 1, 600.

Execution—No Property Found—Levied on Partnership Property—Suit to Enforce.

A creditor who has had an execution returned "no property found," may have another levied on the interest of his creditor in partnership property and may thereafter enforce his lien by a suit in equity. 101

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Improvement on Wife's Property.

The husband may put such improvements on his wife's property as will make it reasonably fit for occupancy by himself and family without such improvements being subject to his debts. 158

PROTEST.

Bills of Exchange—Failure to Present for Payment or Pretext—Excuse—Liability of Endorsers.

Commercial intercourse having been entirely suspended between Kentucky and the city of New Orleans, at which place the bill was payable, at the time of maturity, the failure of the holder to present it for payment or protest at that time, did not operate to release the endorser. ... 77

PUBLIC BUILDINGS.

As to facts on a charge of fraud in procurement of building committee's report for erection of public building, it being too late for court to complain after work approved by its agents,—vol. 1, 477.

PUBLIC OFFICE.

Public office created by the legislature cannot be the subject of private property,—vol. 1, 318.

QUARTERLY COURT.

Land cannot be sold under an execution on a judgment from a quarterly court,—vol. 1, 179.

RATIFICATION.

Where acts of the president of board, approved by other members,—vol. 1, 226.

Sale of wife's land by her husband, and subsequent confirmation and ratification by her,—vol. 1, 160.

RECEIVER.

Court has power to appoint receiver, when administrator has been tardy in settling estate,—vol. 1, 498.

Receiver should execute proper bond, before entering upon discharge of his duties,—vol. 1, 518.

RECEIVING STOLEN GOODS.

It is not sufficient to prove that goods were stolen, but it must be proved that the accused knew of that fact,—vol. 1, 22.

Same,—what was done and said by the party from whom the defendant received the goods is competent as part of the transaction,—vol. 1, 22.

RECOGNIZANCE.

As to rendering judgment for amount greater than fine imposed and costs of court, not exceeding amount of recognizance,—vol. 1, 423.

Appearance of defendant in compliance with bond, and entering into recognizance for future appearance, discharges former sureties,—vol. 1, 565-562.

RECORDS.

Where records of court have been destroyed by fire, court may appoint commission to supply them,—vol. 1, 36.

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RECEIPT.

Prima Facie Evidence.

Though a receipt is only prima facie evidence of payment, and may be explained or even contradicted by evidence aliunde, in the absence of evidence of a mistake, or that it was not precisely what the writer of it intended it to be, it will not be disturbed. 607

REFERENCE.

Commissioner's Report—Consent Reference by Parties—Acceptance of Report.

A consent reference, by the parties to a suit, to the appointment of commissioners, will not bind the defendants to an acceptance of the report to an unequal division of the property, and liability of defendants for rent and improvements on lands, as adjudged against them by the commissioners. 349

REMAINDER.

Descent and Distribution—Life Estate.

A remainder interest in a life estate, is subject to sale under an execution, and an absolute deed therefor may be made. 526

The father of the remaindermen, having purchased their interest at execution sale his note, given therefor is subject to be paid out of the deceased's estate. But this will not affect the life estate of the wife in the land and she cannot be estopped from asserting her tenancy to the tract. 526

Husband and Wife—Wife's Separate Estate for Life—Remainder to Children Held in Trust—Mortgage with Consent of Donor.

The husband bought and paid for land and had the legal title conveyed to himself in trust for the separate use of his wife and of her children during life and after death the remainder for said children: Held, that the husband was not only trustee but donor of the trust, and had a legal right in conjunction with his wife to sell or mortgage her interest for her support 460

RENT.

A purchaser of land, who enters under the contract, in good faith to perform it, should not be held for rent,—vol. 1, 528.

Rent, after it is due, carries interest like other obligations originating in contract,—vol. 1, 8.

Landlords have a lien on the produce of the farm for rent,—vol. 1, 363.

When contract for sale of house and lot rescinded by agreement of parties, rent thereof should be held to be the equivalent of the interest on the sale,—vol. 1, 357.

Contracts—Failure to Take Premises—Criterion of Damages—Burden of Proof.

The price for which property was rented, under a contract, is prima facie the value of the use of the property, and the burden of proof is on defendants to show that they could only get for it the amount reported as received by them. 329

Contract for Sale of Land—Rescission—Damages for Breach.

Upon rescission of a contract for sale of land, damages resulting to the vendee by reason of the failure of the vendor to carry out an agreed rescission between the parties, will be allowed the vendee, it appearing that he vacated the premises at vendor's demand some three months prior to settlement with the vendor, for which time the vendee would be entitled to his rental of the premises. 215

Contracts—Lease—Forfeiture—Non-Payment of Rent.

Where by the terms of a lease it is stipulated that the lessor may re-enter, upon failure to pay rent, the lessor may annul the contract and is entitled to the possession. 91

Dower—Right to Collect Rents on Mansion House until Dower Assigned.

Though the rents from a deceased's estate including the mansion house,

RENT—Continued.

may amount to more than the wife's one-third of the rental value of the whole estate, she cannot be deprived of the rents to her exclusively from the mansion house, since she is entitled to hold that and curtilage without charge until her dower may be assigned her. See also vol. 1, 95. .510

Landlord and Tenant—Discharge of Liability by Payment by Tenant to Husband—Rent Collected by Husband.

Though under the revised statutes, the husband cannot sell his wife's land, nor can they be sold for his debts; he has only the use of them; when they are leased by the husband for a period not greater than three years and he receives the rent therefor, such a payment would discharge the tenant from all liability to pay it again to the wife, or any one else, in case of death of the husband. 290

Tenant Liable for After Conveyance by Landlord—Implied Right to Ingress and Egress.

A conveyance of land with a reversion that the tenant then in possession should have the use of the land until the fall of the year in which the land is sold, gives tenant the implied right of ingress and egress thereafter for the purpose of removing the crop raised by him on the land; and the tenant is not liable for rent for this use of the land. 308

Rent—Implied Agreement for Legatee's Liability for Rent.

The use of lands for a long period of time by a legatee with full acquiescence and knowledge of the other devisees in the absence of any agreement or promise to pay rent therefor, will not subject them to an indebtedness for the use of the premises by implication, in a suit for a division. 349

REPORT.

Guardian and Ward—Duty of Guardian to Make Proper Report.

The purchase by a guardian, of a portion of an estate of a decedent, and execution of his note therefor to the father of his wards, will not relieve him of his duty to report the indebtedness to the proper court as the estate of the wards in his hands. 490

Land—Processioner's Report—Prima Facie Evidence of Location.

The report of survey and designation of boundary made in the presence of the appellant without objection to its accuracy and acquiesced in by him for many years is prima facie evidence against him and it was a continued admission of its accuracy. 137

RESCISSION.

The interference of an older title to about five acres of a large tract of land, is not so essential as to justify a rescission,—vol. 1, 366.

Rescinding of contract where defendant in possession under bond for title,—vol. 1, 82.

Subsequent Purchases—Cross Petition.

A contract will be rescinded on cross-petition of a vendee, who has subsequently purchased a part of the land from the party who is seeking to rescind the contract of his purchase, on the ground of fraudulent statements made to him, where he has represented to his vendee that the statement he complains of were true. 35

Contract for Sale of Land—Damages for Breach—Rent.

Upon rescission of a contract for sale of land, damages resulting to the vendee by reason of the failure of the vendor to carry out an agreed rescission between the parties, will be allowed the vendee, it appearing that he vacated the premises at vendor's demand some three months prior to the settlement of the vendor, for which time the vendee would be entitled to his rental of the premises. 215

Contracts—Failure to Comply with Terms—Election.

When a vendee fails and refuses to comply with the terms of sale, the

RESCISSION—Continued.

- vendor may elect to treat the contract as rescinded or sue for the purchase price. 119
- Vendor—Failure to Perfect Title.**
- The vendor's failure to perfect his title to the land does not entitle him to a rescission of the contract to convey the legal title on the payment of the purchase money. 71
- Land—Sale of—Failure of Title—Fraud and Mistake—Burden of Proof.**
- It is a well established principle that a purchaser who has accepted a conveyance cannot afterwards have a rescission of the contract unless it be for fraud or mistake shown to have operated on him when he accepted the deed and the burden of proof is on the party alleging fraud and mistake. 35
- Lands—Judicial Sales to Pay Purchase Money.**
- A sale of lands under an order of the court, bond executed by the purchaser, and the sale confirmed without exception to the commissioners report filed prior thereto, is not susceptible of rescission, unless the purchaser be prejudiced by being required to pay more than is adjudged in his sale bond. 413

RESIDUARY LEGATEES.

Wills—Devise—Executors and Administrators.

- A will which provides "that one-twelfth of my property or proceeds arising therefrom to be taken possession of by the administrator, and held in trust for the use of my daughter during her life, and pay her yearly what may be deemed reasonable for the use thereof, and at her death, the principal to be paid to her children" is held to provide for the legatee alone, during her life, from the product of the trust funds, and she would have no right to consume the principal, and a loan to her by the administrator of a portion of said principal, was a misappropriation, for which he could be held liable. 344
- Administrators—Settlement—Life Estate—Surrender to Residuary Legatees.**
- Where a surrender of a life estate to her children, is made by a legatee, a settlement should be adjudged up to said surrender, in a suit against the bondsmen of the administrator for an accounting. 345

REPLY.

Where parties to suit litigate question raised in paper styled "reply," it is a part of the record though not marked filed,—vol. 1, 536.

RESTITUTION.

Lands and Conveyances—Pro Forma Defendant not Barred.

- In a suit by a plaintiff for specific performance and conveyance against the holder of the record title to land, the joining of a defendant pro forma who claimed an equity therein, does not bar him of a right to sue his co-defendant for a restitution, it being shown that the suit by plaintiff was for absolute title to the land in controversy, the co-defendant being a mere holder in trust. 437
- Reversal of Judgment of Sale.**
- Upon the reversal of a judgment of sale of land the owner is entitled to restitution, where the creditor is the purchaser notwithstanding he has transferred his purchase to a stranger. 97
- Right of Co-heirs to Restitution.**
- Though the heirs are estopped from such recovery, they can by proper proceeding force restitution of the amount obtained by the sale of the lands to such bona fide purchasers. 625

RESULTING TRUST.

Title Bond—Expectancy.

A father who holds the bonds of his children to convey to him their expectancy to be derived from the estate of their deceased mother, trans-

RESULTING TRUST—Continued.

ferred said bonds by assignments to his son. In a suit to enforce the executory contracts, the father, though not being possessed of the legal title to land, and having agreed not to dispose of his equity, with notice to his vendee, the legal title cannot be coerced at the instance of the heirs so as to defeat the equity of the purchaser of their expectant interest, by a third party. They are deemed, in equity by their bonds, to be the holders of the legal title in trust for their father during his life, and with remainder to their vendee, at his death. 354

Wills—Devise—Power to Sell and Convert into Money.

A will devising lands to a wife, with full power to sell any land she may think proper, "and at her death or at any time she may think proper to give up the whole or part of the property, it is to be divided equally etc.," held, to give the wife the right to convert the land into money for her own bona fide use during life, but would not give her the power to prefer one of the residuary legatees to the exclusion of the others. 447

REVERSION.

Maintenance—Stipulation for in Deed—Failure to Perform Requirements.

The failure of vendees in a deed to provide sufficient maintenance for their relations, as a condition precedent, stipulated in the deed, and their removal to another state and remaining away for several years, is held sufficient to entitle the grantors to a reversion of the title to them. 375

REVIVOR.

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One who purchases property of an insolvent debtor, whose precarious condition was known to him at the time, will be deemed to hold the property in trust for the creditors generally. The payment of part of the purchase money, on the order of the debtor, to a third party, will only give the purchaser a right to be substituted therefor, but he cannot claim a lien for such an amount so paid, over the creditors. 424

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TRUSTS.

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An executor, who loans money of his testator, and by a transfer of the note thus taken, secures other notes from different parties, which latter notes prove worthless on account of his dereliction of vigilance, is held liable personally for the loss thus sustained to the estate. 636

Wife's Separate Estate for Life—Remainder to Children Held in Trust.

The husband bought and paid for land and had the legal title conveyed to himself in trust for the separate use of his wife and of her children during life and after her death the remainder for said children. Held, that the husband was not only trustee but donor of the trust, and had a legal right in conjunction with his wife to sell or mortgage her interest for her support. 460

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In a suit to enforce a purchase money lien, where the vendor fails to make or offer to make a good and valid deed of conveyance, and the vendees demand and secure a rescission, of the contract of purchase, they having gone into possession of the property at the time of the executory sale, they must be held for waste committed, rents and profits, while the property was retained by them, subject to an allowance for permanent and lasting improvements to the extent of ameliorations at the time of the return of the property. 357
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Same, Nothing but an absolute payment of purchase price will authorize court to compel a surrender,—vol. 1, 291.

An assignment of a purchase money note, is an assignment of the lien pro tanto, but if note is assigned without recourse, lien is gone,—vol. 1, 291.

Widow's dower is prior and superior to a claim for unpaid purchase money,—vol. 1, 291.

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Fraudulent Representation—Opinion—Quantity—Quality—Value.

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In a suit to enforce a purchase money lien, where the vendor fails to make or offer to make a good and valid deed of conveyance, and the vendees demand and secure a rescission, of the contract of purchase, they having

WASTE—Continued.

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Wills—Incapacity of Testator—Undue Influence.

An unequal distribution of an estate amongst his children by a testator, excluding entirely two of them whom he had formerly stated would be provided for, and the driving away from his home of two of his children when they were sick, at the instigation of the fortunate devisees, held to show undue influence, and to render the will void. 411.

Wills—Construction—Devise to Wife for Her Separate Use—Exclusion of Husband.

A devise to a wife which provided that she should have and enjoy the annual rents, hire, and interest of the estate, with the privilege of disposing of it by devise or gift as she might desire, is held to be a devise for the separate use of the wife to the exclusion of her husband's marital rights therein. 277

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I, J. Morgan Chinn, Clerk of the Court of Appeals of Kentucky, certify that the foregoing opinions are true and correct copies of opinions in the foregoing cases as appears from the records now on file in my office.

Given under my hand as Clerk aforesaid this 6th day of June, 1907.

J. MORGAN CHINN,

Clerk of Court of Appeals of Kentucky.



